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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1[illegible]. 457 18[illegible]

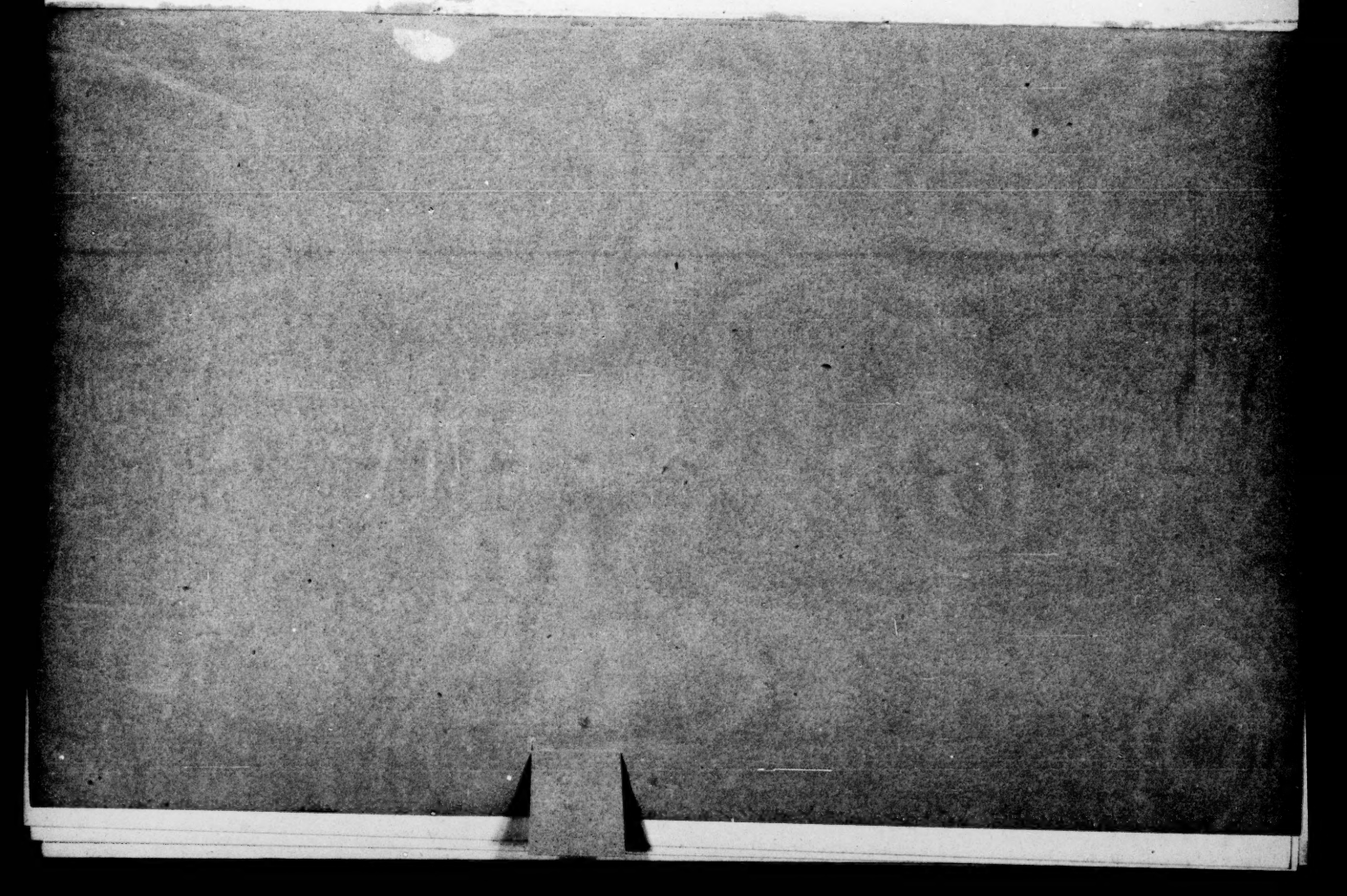
CHARLES B. HOARD, APPELLANT,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED OCTOBER 31, 1883.



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OCTOBER TERM, 1883.

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vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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1 Pleas before the Honorable John J. Jackson, judge of the District Court of the United States for the District of West Virginia, at Charleston, on the 10th day of May, 1883, and in the 107th year of the Independence of the United States of America.

Be it remembered that heretofore, to wit, at a district court of the United States for the district of West Virginia, holden at Charleston, on Thursday, the 3d day of May, 1883.

C. B. HOARD, Comp't,
vs.
CHESAPEAKE AND OHIO RAILWAY CO., Def't. } In Chancery.

The complainant, C. B. Hoard, this day filed in open court his bill of complaint against the defendant, the Chesapeake and Ohio Railway Company; and, on motion of complainant, process is awarded him in his said bill, returnable to June rules next.

Which bill is in the words and figures following, to wit:

2 *The Bill of Complaint of C. B. Hoard against The Chesapeake and Ohio Railway Company, filed in the United States District Court for the District of West Virginia, at Charleston.*

To the Hon. John J. Jackson, judge of said court:

The complainant complains and says that heretofore, to wit, about the year 1867, the Chesapeake and Ohio Railroad Company was incorporated and duly organized by the Legislature of West Virginia, with power and franchise to construct and operate a railroad from Richmond, in the State of Virginia, to the mouth of Big Sandy river, in the State of West Virginia; that before the year 1873 the said railroad was located by the said company through the village of Ceredo, in Wayne county, West Virginia, and through a large number of town lots in said village, the property of the complainant, and through a large number of the streets and alleys of said village, by and with the consent of said village. And that after the said company had so legally located the line of their said road through the said village, and through its streets and alleys, and through the town lots belonging to the complainant, the said complainant and the said company, on the 28th day of July, 1873, entered into a written contract, regulating the right of way of said railroad
3 through said village, its streets and alleys, and through the lands and lots of said complainant, and agreeing upon the value thereon and damage done to the residue of complainant's property; the said contract was sealed with the seal of said company and signed by its president and secretary, they thereto being duly authorized, and was also signed and sealed by the said complainant. A printed copy of said contract is here filed, and marked Exhibit No. 1. By an inspection of said contract it will be seen that its provisions and covenants are very valuable to the complainant, if said provisions and covenants had been fairly and honestly observed and carried out. The money consideration, ($1,000.00) one thousand dollars, though the contract recites its payment, has never

been paid, and is still due and owing, with near ten years' interest thereon.

The money consideration is the smallest in value of the covenants and promises in said contract contained. The complainant was then, and now is, the owner of the larger portion of the lots in said village of Ceredo. The construction of the road through Ceredo, upon the line as located by the company, together with the construction of the depot and station-house in said town, near the Ceredo House, and its maintenance and use, and the construction and maintenance of the sidings in said contract provided for, would
4 have been, and will be, of inestimable benefit and pecuniary advantage to the complainant.

Complainant alleges that if said contract had been or was now carried out in good faith the effect would be to enhance in value the town lots and other property owned by him, in and near the town of Ceredo, more than $25,000.

Complainant alleges that, in pursuance of said contract, the company, by its duly authorized agents and officers, took possession of the line so located by it through said village and through the lots and property of said complainant, and made large and extensive excavations and fills through the same, and partially graded their line through said property, in accordance with the provisions of said contract.

Complainant further alleges that, subsequent to the transactions above enumerated, a bill was filed in the circuit court of Kanawha county to foreclose certain mortgages therebefore executed by the said Chesapeake and Ohio Railroad Company upon all of its property and franchises; that there was a decree of sale, a sale, and confirmation of the sale, and a deed was executed to A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Jr., and John Catrue, who, by virtue of such deed and the law, became a corporation by the name of "The Chesapeake and Ohio Railway Company," and entitled to all the works, property, estate, rights, franchises, and
5 privileges theretofore owned and possessed by the Chesapeake and Ohio Railroad Company, and subject to all the restrictions imposed by law upon said last-named company.

Complainant further alleges that in the month of October, 1879, the defendant, the new company, although it had full knowledge of the contract so made as aforesaid by the complainant, and the Chesapeake and Ohio Railroad Company as aforesaid, on the 28th day of July, 1883, with that disregard of good faith and the obligation of contracts, which is so painfully common with modern railroad companies, and in direct violation of the contract of 28th July, 1873, and in palpable violation of law, abandoned its partially completed and located line through the village of Ceredo, and located a new line through the lands of the complainant and the Ceredo Cemetery Company, outside and back settled part of the village of Ceredo, and separated therefrom by a deep ravine.

On 6th October, 1879, proceedings in condemnation were filed in the county court of Wayne county to condemn the lands through which the line runs, and so far progressed that commissioners were

appointed, and a report was made, and the compensation and damages ascertained by the commission was paid into court, and the suit and proceedings have, under the act of Congress, been
6 removed to this court, and are still pending therein. A copy of such suit and proceedings are here filed as part of this bill, marked Exhibit No. 2. Under and by virtue of these proceedings the defendant has constructed its line of road through the lands of the complainant and the Ceredo Cemetery Company on their second location, and daily run many trains, freight and passenger, through and over complainant's lands, on said new line, described as aforesaid in the record, Exhibit No. 2.

Complainant alleges that all the proceedings in condemnation contained in the record, Exhibit No. 2, are without authority of law, and are null and void, and that the entry of said defendant upon the lands of the complainant by virtue of said proceedings, and the construction of said railroad through said lands was a high-handed trespass, and the daily running of trains over and across the lands of the complainant is a continuous trespass upon said lands, and assigns the following reasons:

1. The proceedings in condemnation were had under and by virtue of chapter 88 of the Acts of West Virginia, passed in the year 1873, (page 213.) The act only authorizes the proceedings in condemnation where the parties failed to agree, (Sec. 18.) Here the parties had agreed under seal.

2. The railroad who has established its line cannot change its grade or location, except for adequate cause, (clause fifth,
7 section 20, page 224.) No cause is assigned in the petition for change of location.

3. There is no adjudication by any court that the land sought to be taken is subject to condemnation, and may be lawfully taken for a purpose of public utility, and there is not to be found in the record any order, sentence, or decree of condemnation. And until such order, sentence, or decree be had, the defendant has no right or authority to construct a road, or to run trains over complainant's land. Complainant alleges that the acts and doings of the said defendant, as are herein stated, are in plain and manifest violation of its charter, and exceed the powers granted it by law. And inasmuch as this court has heretofore prohibited the complainant by injunction from obtaining any relief in the State courts in regard to the matters here complained of, as will be seen by a copy of the order of this court here filed, marked Exhibit No. 3, complainant is only relievable in this court.

Complainant therefore prays that the Chesapeake and Ohio Railway Company be made a party defendant to this bill; that process may issue; that defendant may be compelled to answer the same; that the contract of 28th July, 1878, be specifically enforced;
8 that the defendant may be compelled to permanently maintain, establish, and run its road through the village of Ceredo, as specified in the contract; that it erect and maintain a depot and place for the convenient and regular receipt and delivery of freight and passengers in the town of Ceredo, near Ceredo Hotel; that it

may be decreed to pay to the complainant the sum of $1,000, with interest from the date of the contract; that it may be decreed to do and perform all and everything covenanted to be done and performed by the railroad company by the contract aforesaid; that the defendant may be inhibited, restrained, and enjoined from all further proceedings in condemnation case pending in this court in the name of the Chesapeake and Ohio Railway Co. *vs.* Hoard and *als.* And after the answer shall have come in, and the cause shall have been fully heard, that defendant be perpetually enjoined, inhibited, and restrained from running its cars, engines, and trains over the complainant's land on the present location of their road, and as now constructed. And that complainant have general relief.

C. B. HOARD, *By Counsel.*

SMITH & KNIGHT AND QUARRIER, *Sol's.*

KANAWHA COUNTY, *to wit:*

Personally appeared before the undersigned, a notary public
9 in and for said county, C. B. Hoard, and made oath that the allegations in said bill contained, so far as made upon his own knowledge are true, and so far as they are made upon the knowledge of others he belives them to be true.

Given under my hand this —— day of May, 1883,

J. D. BAINES,

Notary Public in and for Kanawha County, West Virginia.

Exhibit No. 1, referred to in the foregoing bill, is in the words and figures following, to wit:

10 This deed, made this twenty-eighth day of July, 1873, by and between C. B. Hoard, of Watertown, New York, party of the first part, and The Chesapeake and Ohio Railroad Company, party of the second part, witnesseth: That for and in consideration of the sum of one thousand dollars in hand paid, the receipt whereof is hereby acknowledged, and also for and in consideration of the conveniences and benefits resulting from the permanent establishment and maintenance, when the railroad of the party of the second part through Ceredo is opened for trade and business, of a depot and place for the convenient and regular receipt and delivery of freight and passengers in the town of Ceredo, at a point near the "Ceredo House;" and also in consideration of the premises hereinafter stated, the party of the first part doth grant and convey unto The Chesapeake and Ohio Railroad Company all those tracts or parcels of land lying and being in Wayne county, West Virginia, and laid down and colored red on a plat hereto annexed and made part of this deed; that is to say:

First. All the land lying between two parallel lines sixty feet apart, and extending from the west line of the lands of the party of the first part to the east line of East Ninth street of the town of Ceredo, in the county of Wayne.

Second. All the land lying between two parallel lines one hun-

dred feet apart, and extending from East Ninth street, in said town, to station 2179x35, on the line of the railroad of the party of the second part, and in the line of Simeon Hersey.

Third. All the land lying between two parallel lines one hundred and twenty-five feet apart, and extending from station 2174x95, of said railroad, in the east line of said Simeon Hersey, to station 2172x08, of said railroad.

Fourth. All the land lying between two parallel lines two hundred and twenty feet apart, and extending from station 2172x08, crossing Twelve Pole creek, to station 2168x28, of said road.

Fifth. All the land lying between two parallel lines one hundred feet apart, and extending from station 2168x28, of said railroad, to station 2159x50.

Sixth. All the land as laid down on the plat hereto annexed lying between the exterior eastern line of the tract last described and station 2153x75, and within two parallel lines 100 feet apart.

From the boundaries thus described there is excepted such lots or parts thereof as are not colored red on the plat hereto annexed; there is also excepted from the boundary last described any part of the county road which may be included within the same.

Tho party of the first part does, however, further grant and convey all rights and estates which he has and owns in, to, and upon such parts of the streets and alleys in the town of Ceredo, and all public roads as are included within the boundaries of any of the above described tracts of land.

But this grant is made on this condition, that in the event the event the above described boundaries of land should cease to be used for railroad purposes by the party of the second part, its successors and assigns, then the estate hereby granted shall revert to the party of the first part, his heirs and assigns.

The party of the first part covenants to warrant generally the property hereby conveyed; but this covenant is not to create any liability on the part of the party of the first part in excess of the money consideration hereinbefore expressed, and only to that extent, in case the party of the second part should be divested of its title to all of the several tracts hereinbefore conveyed. In case the party of the second part should be divested of its title to only a part of the lands hereby conveyed, then this covenant is to be construed to create a liability on the part of the party of the first part to the extent of such proportion of the sum of one thousand dollars, as the property, the title whereof is divested, bears to all the property hereby conveyed.

It is also understsod that the party of the first part is to have leave and permission to connect a single siding or branch with the track of the railroad of the party of the second part, at a point east of the lots now owned by Z. D. Ramsdell, and west of the "Ceredo Hotel," hereinbefore mentioned.

It is also understood that the party of the second part is to erect, immediately after the construction of the railroad of the party of the second part, and thereafter whilst the said tracts continue to be worked in fields, lawful fences on each side of the property above

described, as follows: On both sides of the above described lands, from the western exterior line thereof to West First street, in the town of Ceredo.

Also on both sides of the above described lands, from East Fifth street to a street now leading from Main or B street to the saw mill now located on the bank of the Ohio river, in said town.

Also on both sides of the above described lands, from the last named street to East Eleventh street.

Also on both sides of the above described lands, from the last named street to the west side of Twelve Pole creek.

Also on both sides of the above described lands, from the east side of Twelve Pole creek to the western boundary of the lands of William Bartram.

It is also understood that whilst the railway of the party of the second part is being constructed through the tracts of land hereinbefore described, and to be fenced as aforesaid, the party of the second part agrees to keep the said tracts enclosed against all trespassing stock and cattle.

In testimony whereof, the party of the first part has hereunto affixed his signature and seal, and the party of the second part has caused this deed to be signed on its behalf by its president and secretary, and has also caused its corporate seal to be affixed hereto.

(Signed) C. B. HOARD. [SEAL.]

Witness to the signature of C. B. Hoard:

(Signed) S. FLOYD HOARD.

(Signed) C. P. HUNTINGTON, *President.*

(Signed) JAMES J. TRACY, *Secretary.*

THE CHESAPEAKE AND OHIO RAILROAD COMPANY,

September 1, 1868.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Be it remembered that on this first day of September, A. D., 1873, before me, Charles Nettleton, a commissioner of the State of West Virginia, in and for the State of New York, residing in said city of Dew York, personally appeared C. P. Huntington, the president of the Chesapeake and Ohio Railroad Company, and James J. Tracy, the secretary of the same company, to me, respectively, personally known to be such, who being by me severally duly sworn, did depose and say, that he, said C. P. Huntington, resided in said city of New York; that he, said James J. Tracy, resided in Tarrytown, in the State of New York; that he, said C. P. Hudtington, was the president, and he, said James J. Tracy, was the secretary, of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the board of directors of said company, and that they, the said C. P. Huntington and James J. Tracy, signed their names thereto, by the like order, as president and secretary of said company respectively. And the said C. P. Huntington and James J. Tracy also acknowledged the foregoing instrument to be their own act and deed and the act and

deed of said company, they being the persons whose names are signed to the foregoing instrument, bearing date July 28th, 1873, all in my State aforesaid.

In witness whereof, I have hereunto set my hand and affixed my official seal, this first day of September, A. D. 1873.

[SEAL.] (Signed) CHARLES NETTLETON,
Commissioner for West Virginia in New York,
117 *Broadway, New York City.*

STATE OF WEST VIRGINIA, } *ss:*
Wayne County, }

I, Milton Shelden, a notary public in and for the said county of Wayne, do certify that C. B. Hoard, whose name is signed to the foregoing instrument of writing, bearing date the 28th day of July, 1873, this day personally appeared before me, in my said county, and acknowledged the same.

Given under my hand, this 21st day of July, 1879.

(Signed) MILTON SHELDEN,
Notary Public in and for Wayne County, West Virginia.

11 Exhibit No. 2, referred to in the foregoing bill, is in the words and figures following, to wit:

At a District Court of the United States for the District of West Virginia, held at Charleston May 18, 1880.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Applicant and Plaintiff,
vs.
C. B. HOARD, D. H. BALDWIN, SAMUEL FLOYD HOARD, and the CEREDO CEMETERY ASSOCIATION, Defendants.

On Motion to take Private Property for Public Use.

This day came the plaintiff, by its attorney, and presented a complete transcript of the record of the above-entitled proceeding, by which it appears that the same was removed to this court from the county court of Wayne county, West Virginia; and on motion the said record is ordered to be filed, and this proceeding is docketed in this court, to be proceeded with according to the act of Congress in such cases made and provided.

The transcript of record referred to in the foregoing order is in the words and figures following:

At a County Court began and held at the Court-house of Wayne County on the 6th day of October, 1879.

12 THE CHESAPEAKE AND OHIO RAILWAY COMPANY
against
C. B. HOARD, SAMUEL FLOYD HOARD, D. H. BALDWIN, and the CEREDO CEMETERY ASSOCIATION.

On Motion to take Private Property for Public Use.

This day came the Chesapeake and Ohio Railway Company, by

counsel, an presented an application, accompanied by the plats therein referred to, praying for the appointment of commissioners to view the strips of land in said application described, and ascertain a just compensation therefor, and that such other orders may be entered and proceedings had as may be needful to vest in said company a full, complete, and legal title to each of said strips of land; and it appearing that due and legal notice of this proceeding, returnable on this day, was given by personal service of notice more than ten days prior to this day to C. B. Hoard, Samuel Floyd Hoard, D. H. Baldwin, and the Ceredo Cemetery Association, it is ordered that this application aforesaid be filed and this proceeding docketed.

On the same day, Oct. 6, 1879, there was a petition filed, which is as follows:

Petition.

To the worshipful president and justices of the county court of Wayne county, West Virginia:

13 The petition of the Chesapeake and Ohio Railway Company respectfully shows that it is a corporation duly chartered and organized under and by virtue of the laws of Virginia and West Virginia for the purpose, among other things, of constructing, operating, and using a double-track railway and branches in said States; that in accordance with its charter it heretofore, to wit, in the month of May, 1879, caused it to be surveyed and located a part of its line of railway through the county of Wayne, in the State of West Virginia, and on the lands in said county, which will be hereafter fully described; that for the purpose of constructing, operating, and using its said railway it will require the lands so described, and that it is unable to agree with the owners and claimants thereof upon the compensation to be paid thereof, and that it is accordingly compelled to resort to the methods prescribed by law for ascertaining such compensation and acquiring title to said lands. The land required by your petitioner for the purpose aforesaid, and to be appropriated to the construction, operation, and use of its said railway, is more particularly described as follows:

First. A strip of land owned by C. B. Hoard, beginning on the center line of said railway at station 2209 x 70, where said line crosses the boundary between lands of C. B. Hoard and Z. D. Ramsdell, in center of Twelve-pole river, with a bearing S. 26° W;

14 thence with said center line, and a width of 100 feet on each side thereof to station 2211 x 40; thence continuing with said center line, and a width of 33 feet on each side thereof to station 2227 x 15; thence continuing with said center line, and with a width of 50 feet on each side thereof to station 2232; thence continuing with said center line, and a width of 33 feet on each side to where said center line crosses the boundary between the lands of C. B. Hoard and James Ferguson, with a bearing N. 1° 30′ E. at station 2236 x 35, which strip contains four and fifty-one hundredths acres.

Second. A strip of land owned by C. B. Hoard, beginning on the center line of said railway at station 2153, where said line crosses the boundary between the lands of C. B. Hoard and S. S. Vinson with a bearing N. 82° E; thence with said center line, and a width of 33 feet on each side thereof to station 2183 x 30, where said center line crosses the boundary between the lands of C. B. Hoard and Z. D. Ramsdell, with a bearing N. 11° 45′ W, which strip contains four and fifty-five one hundredths acres. Adjoining the above-described strip, and on the north side thereof, a strip of 30 feet wide will be required for a site for a county road, which will have to be changed. In the above-described strips, your petitioner is informed that Samuel Floyd Hoard and the Ceredo Cemetery Association claim some interest, but the nature of such interest is unknown to your petitioner.

In the same strips your petitioner is informed that one D. H. Baldwin claims a lien by mortgage, but the amount due thereon is to your petitioner unknown.

Plats showing each of the above-described strips of land are herewith filed, marked, respectively, "A" and "B."

To the end, therefore, that your petitioner may acquire title to the several strips aforesaid, and that it may be permitted to enter upon, use, and enjoy the same, it has caused notice of this application to be given to the parties respectively interested therein; and it therefore prays that your honorable court will cause commissioners to be appointed, pursuant to the statute in such cases, to view the said strips of land and ascertain a just compensation therefor to the parties respectively entitled thereto, and that such other orders may be entered and proceedings had as may be needful to vest in your petitioner a full, complete, and legal title to each of said strips of land.

And as in duty bound your petitioner will ever pray, &c.

THE CHESAPEAKE AND OHIO RAILWAY CO.,
By Counsel.

WM. H. HOGEMAN, *Att'y.*

Afterwards, on the 16 day of August, 1879, there was a notice issued, which, with the return, is as follows:

Notice.

To C. B. Hoard, Samuel Floyd Hoard, D. H. Baldwin, The Ceredo Cemetery Association:

Take notice that on the first Monday of October, 1879, an application will be made to the county court of Wayne county, West Virginia, at a term thereof to be held at the court-house of said county on that day for the appointment of commissioners to ascertain a just compensation to the owners for the several parcels of land lying in Wayne county, West Virginia, on the line of the Chesapeake and Ohio Railway, as surveyed in May, 1879, in which you are interested, the said parcels of land are laid down on a plat showing said line between Huntington and the Big Sandy river,

which will be filed in the office of the clerk of the county court of Wayne county, with the written application. Reference is made to the said plat and accompanying descriptions for a more particular description of the several parcels of land proposed to be taken in said tracts you are represented to be interested as owners, claimants, or lien-holders. You are further notified that at such time, and during the pendency of these proceedings, application will also be made for such other orders and proceedings as may be
17 necessary to condemn the said parcels of land, and each of them, for the purposes hereinafter named.

The said parcels of land, and each of them, are proposed to be taken by the Chesapeake and Ohio Railway Company, a corporation acting under the laws of Virginia and West Virginia, and intended by the said company to be used and appropriated for the purpose of constructing and using a double-track railroad, under and by virtue of its charter from the city of Huntington, in Cabell county to the Big Sandy river, in Wayne county, West Virginia.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

Dated August 16, 1879.

Return.

WEST VIRGINIA, *Wayne County,* } *To wit:*

D. W. Emmons, being duly sworn, says that on the 16 day of August, 1879, he delivered copies of the within notice to C. B. Hoard and Sam'l Floyd Hoard.

D. W. EMMONS.

Subscribed and sworn to before me, this 16 day of August, 1879.

CHAPMAN ADKINS,
Notary Public, Wayne Co., W. Va.

On the same date there was another notice issued, which, together with the return, is in the words and figures following:

Notice.

To C. B. Hoard, Samuel Floyd Hoard, and D. H. Baldwin, The Ceredo Cemetery Association:

18 Take notice that on the first Monday of October, 1879, an application will be made to the county court of Wayne county, West Virginia, at a term thereof to be held at the court-house of said county on that day, for the appointment of commissioners to ascertain a just compensation to the owners for the several parcels of land lying in Wayne county, West Virginia, on the line of the Chesapeake and Ohio Railway, as surveyed in May, 1879, in which you are interested. The said parcels of land are laid down on a plat showing said line between Huntington and the Big Sandy river, which will be filed in the office of the clerk of the county court of Wayne county, with the written application. Reference is made to the said plat and accompanying descriptions for a more particular

description of the several parcels of land proposed to be taken. In the said tracts you are represented to be interested as owners, claimants, or lien-holders.

You are further notified that at such time, and during the pendency of these proceedings, application will also be made for such other orders and proceedings as may be necessary to condemn the said parcels of land, and each of them, for the purposes hereinafter named.

The said parcels of land, and each of them, are proposed
19 to be taken by the Chesapeake and Ohio Railway Company, a corporation acting under the laws of Virginia and West Virginia, and intended by the said company to be used and appropriated for the purpose of constructing and using a double-track railroad, under and by virtue of its charter from the city of Huntington, in Cabell county, to the Big Sandy river, in Wayne county, West Virginia.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

Dated August 16th, 1879.

Return Thereon.

AUGUST 18, 1879.

I accept service of the within notice.

Z. D. RAMSDELL,
President of the Ceredo Cemetery Association.

On the 5th day of July, 1879, there was another notice issued, which is as follows

Notice.

To C. B. Hoard, Samuel Floyd Hoard, The Ceredo Cemetery Association, and D. H. Baldwin:

Take notice that, on the first Monday of October, 1879, an application will be made to the county court of Wayne county, West Virginia, at a term thereof to be held at the court-house of said county on that day, for the appointment of commissioners to ascertain a just compensation to the owners for the several parcels of
20 land lying in Wayne county, West Virginia, on the line of the Chesapeake and Ohio Railway, as surveyed in May, 1879, in which you are interested. The said parcels of land are laid down on a plat of said line, which will be filed in the office of the clerk of the county court of Wayne county, with the written application. Reference is made to the said plat and accompanying descriptions for a more particular description of the parcels of land proposed to be taken. In the said tracts you are represented to be interested as owners, claimants, or lien-holders.

You are further notified that at such time and during the pendency of these proceedings application will also be made for such other orders and proceedings as may be necessary to condemn the said parcels of land, and each of them, for the purposes hereinafter named. The said parcels of land, and each of them, are proposed

to be taken by the Chesapeake and Ohio Railway company, a corporation acting under the laws of Virginia and West Virginia, and intended by said company to be used and appropriated for the purpose of constructing and using a double-track railroad, under and by virtue of its charter, from the city of Huntington, in Cabell county, to the Big Sandy river in Wayne county, West Virginia.

21 THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
By Counsel.
WM. H. HOGEMAN, *Counsel.*

Dated July 5, 1879.

Return.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

James B. Hawes, being duly sworn, deposes and says that, on the 22d day of August, 1879, at No. 34 Pine street, in the city of New York, he then being over 21 years of age, he served the within notices on D. H. Baldwin personally, by delivering a copy thereof to him personally, and leaving the same with him, and that he knew the person so served to be the person mentioned and described in said notice.

JAMES B. HAWES.

Sworn to before me, this 22d day of August, 1879.
[L. S.] WM. C. McKRAW,
Notary Public, New York City and Co.

Afterwards, at a county court continued and held for Wayne county, at the court-house thereof, on the 7th day of April, 1880, there was an order made in this cause, which, with the summons and returns, is as follows:

Order App't'g Com'rs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
22 *against*
C. B. HOARD and S. FLOYD HOARD, THE CEREDO CEMETERY ASSOCIATION, and D. H. BALDWIN.

On Motion to Take Private Property for Public Use.

This day came the parties to the above-entitled proceeding, by their attorneys—that is to say, the applicant by M. J. Ferguson and W. H. Hogeman, its attorneys, and the defendants by Eustace Gibson, their attorney—and, by consent, it is adjudged and ordered that L. T. Smith, Lamech Adkins, Lafayette Vinson, Alderson Workman, James P. Keyser be, and they are hereby, appointed to go upon the tracts of land described in the written application heretofore filed herein, and, after viewing the same, ascertain a just and equitable compensation therefor, according to the statute in such

case made and provided, and that they report their proceedings by the next term of this court. The defendants reserve the right to file any answer or paper, or to make any defence or resistance to the proceedings upon the coming in of the commissioners' report at the next term of this court that they might have made at this term to the appointment of said commissioners, or that they might make at the next term in resistance to the confirmation of any report that said commissioners may make, as fully and completely as if
23 this order had never been entered, and any and all questions which shall be raised by the defendants at the next term as aforesaid, if any, shall be fully adjudicated by this court before the report of said viewers or commissioners shall be confirmed by this court.

W. H. HOGEMAN,
M. J. FERGUSON,
Atty's for Applicant.
EUSTACE GIBSON,
Att'y for Defendants.

Sum.

To L. T. Smith, Lamech Adkins, Lafayette Vinson, Alderson Workman, and James P. Keyser:

You and each of you are hereby summoned in the name of the State of West Virginia to meet on April 28, 1880, at 10 o'clock a. m., at the toll bridge across Twelve Pole river, in Ceredo, Wayne county, West Virginia, to execute the foregoing order, entered by the county court of Wayne county, on April 7, 1880.

Given under my hand, this 7th day of April, 1880.

H. F. BOWEN, *S. W. C.*

Return.

Executed on Lamech Adkins, L. F. Vinson, and A. Workman by delivering to each of them a true copy of the within order and summons, Apr. 7, 1880.

H. F. BOWEN, *S. W. C.*

Executed on J. P. Keyser by delivering to him a true
24 copy of the within order and summons, April 12, 1880.

H. F. BOWEN, *S. W. C.*

Executed on L. T. Smith by delivering to him an office copy of the within order or summons, April 15, 1880.

J. P. BROMLEY,
Dep't for H. F. Bowen, S. W. C.

Report.

To the worshipful president and justices of the county court of Wayne county, West Virginia:

We, the undersigned viewers, appointed by an order of the county court of Wayne county, West Virginia, entered on the 7th

day of April, 1880, in the proceeedings therein pending, in which the Chesapeake and Ohio Railway Company is applicant and C. B. Hoard, S. Floyd Hoard, D. H. Baldwin, and the Ceredo Cemetery Association are defendants, to view certain tracts of land in said proceeding described, and ascertain a just and equitable compensation therefor, according to the statutes in such case made and provided, respectfully report that after being first duly sworn, as appears by the oath taken and subscribed by us, and herewith returned, we met at the toll bridge across Twelve Pole river in Ceredo, Wayne county, West Virginia, on the 28th day of April, 1880, that being the time and place appointed by the sheriff
25 of Wayne county, West Virginia, and of which due notice was given to the parties, as appears by the summons and notice and the returns thereon, herewith filed, and viewed the tracts of land hereinafter described, that is to say:

First. A strip of land owned by C. B. Hoard, beginning on the center line of the extension of the Chesapeake and Ohio Railway, in Wayne county, West Virginia, as surveyed in May, 1879, at station 2153, where said line crosses the boundary between the lands of C. B. Hoard and S. S. Venison, with a bearing N. 82° E.; thence with said center line and a width of 33 feet on each side thereof to station 2183 x 30, where said center line crosses the boundary between the lands of C. B. Hoard and Z. D. Ramsdell, with a bearing N. 11° 45′ W., which strip contains $4\frac{55}{100}$ acres, and adjoining the above-described strip, and on the north side thereof, a strip thirty feet wide, required and intended to be used for a county road, which will be changed through the land of C. B. Hoard, which contains $2\frac{58}{100}$ acres.

Second. A strip of land owned by C. B. Hoard, beginning on the center line of said railway, at station 2209 × 70, where said line crosses the boundary between the lands of Z. D. Ramsdell and C. B. Hoard, in the center of Twelve Pole river, with a bearing S.
26 26 W.; thence with said center line, with a width of 100 feet on each side thereof, to station 2211 × 40; thence, continuing with said center line and a width of 33 feet on each side thereof, to station 2227 × 05; thence, continuing with said center line and a width of fifty feet on each side thereof, to station 2232 x 05; and thence, still continuing with said center line and with a width of 33 feet on each side thereof, to station 2236 x 35, where said center line crosses the boundary between the lands of C. B. Hoard and James Ferguson, with a bearing N. 1° 30′ E., which strip contains $4\frac{51}{100}$ acres; and we are of the opinion that for the strip described in the above paragraph, numbered "first," the sum of four hundred dollars, and we ascertain and determine that the applicant shall pay said sum therefor, being $50 per acre for the lands and $66.66 for damages, will be a just compensation, and for damages to the residue of the lands of which the same forms a part. In fixing this sum for these strips, it is with the understanding that it is the purpose of the applicant to construct a retaining wall on the strip of $4\frac{55}{100}$ acres, through the yard, in front of the white frame dwelling-house, on the upper side of the turnpike, whenever, if ever, the

applicant cuts into said strip in front of said house, so as to make said yard liable to slide or slip. And we report in reference
27 to said strip of $4\frac{55}{100}$ acres that if any part thereof belongs to the Ceredo Cemetery Association, that said association is entitled to so much of the said sum of $400 as will pay said association at the rate of $50.00 per acre for the proportion of said $4\frac{55}{100}$ as is owned by said association. And we are of the opinion that for the strip of $4\frac{51}{100}$ acres described in the above paragraph, numbered "second," and for damages to the residue of the lands of which the same forms part, the sum of six hundred and seventy-five dollars (being at the rate of one hundred and fifty dollars per acre) will be a just compensation, and we ascertain and determine that the applicant shall pay said sum therefor.

Given under our hands and seals, this 28th day of April, 1880.

L. T. SMITH. [SEAL.]
LAMACH ADKINS. [SEAL.]
A. WORKMAN. [SEAL.]
JAMES P. KEYSER. [SEAL.]

L. T. Smith	$6 00	—Attendance and mileage.	
J. P. Keyser,	6 00	"	"
L. Adkins	5 50	"	"
A. Workman	5 00	"	"
Sheriff's fee	5 75	"	"

28 Afterwards, to wit, on the 8th day of May, 1880, the following memorandum of receipt in the words and figures following, was filed:

Memorandum.

On the 8th day of May, A. D. 1880, there was deposited in this office and paid to me as the clerk of the Wayne county court by the Chesapeake and Ohio Railway Company one thousand and seventy-six dollars and seventy-six cents, for which a receipt was given by me and delivered to D. W. Emmons as and for the sum of $1,075, the principal sum allowed in the within report, and $1.76 for interest thereon.

Given under my hand as clerk, the day and year first above written.

P. H. NAPIER, *Clk, W. C. C.*

Afterwards, to wit, on the 17th day of May, at 5 o'clock a. m., 1880, the following petition was presented and filed, which is in the words and figures following:

Petition to Remove Cause to District Court of the United States for the District of West Virginia.

In the County Court of Wayne County, West Virginia.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Applicant and Plaintiff,
against
C. B. HOARD, D. H. BALDWIN, THE CEREDO CEMETERY ASSOCIATION, and S. FLOYD HOARD, Defendants.

29 On Motion to take Private Property for Public Use.

To the worshipful president and justices of the said court:

Your petitioner, The Chesapeake and Ohio Railway Company, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of cost, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States; that the petitioner was, at the time of the commencement of this suit, and still is, a corporation created and organized under and by virtue of the laws of the States of Virginia and West Virginia, and a citizen of said States, and that D. H. Baldwin and C. B. Hoard were then, and still are, citizens of the State of New York, and that S. Floyd Hoard was then, and still is, a citizen of the State of West Virginia, and the Ceredo Cemetery Association was then, and still is, a corporation created and organized under and by virtue of the laws of West Virginia, and a citizen of said State. And your petitioner offers herewith a bond with good and sufficient surety for its entering in the district court of the United States for the district of West Vir-
30 ginia, sitting at Charleston, on or about the first day of its next session, a copy of the record in this suit, and for the paying all the costs that may be awarded by said district court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said district court, and it will ever pray, &c.

WM. H. HOGEMAN,
Attorney for Chesapeake and Ohio Railway Co.

Know all men by these presents, that I, Delos W. Emmons, responsible person for the Chesapeake and Ohio Railway Company, and Wm. H. Hogeman, his surety, are held and firmly bound unto C. B. Hoard, D. H. Baldwin, The Ceredo Cemetery Association, and S. Floyd Hoard in the penal sum of five hundred dollars, the payment whereof, well and truly to be made unto the said C. B. Hoard, D. H. Baldwin, The Ceredo Cemetery Association, and S. Floyd Hoard, or either or any of them, their heirs, successors, and assigns, we bind ourselves, our heirs, representatives, and assigns,

at a district court of the United States for the district of West Virginia, held at Charleston.

C. B. Hoard and others having tendered exceptions to the report of the commissioners in the above proceedings, and demanding a jury to determine the damages, pursuant to sec. 18, chap. 88 of Acts of 1872–'3, it is ordered that the same be filed for future action thereon, reserving to the said C. B. Hoard and the other claimants the right to a hearing and determination of the exceptions to the jurisdiction of this court, and the motion pending to remand the case to the county court of Wayne county.

To the filing of which, W. H. Hogeman, on the part of said railway co., objected, and such exceptions are reserved for future action of this court.

The exception to the comm'rs' report, referred to in the foregoing order, is in the words and figures following, to wit:

36 In the Matter of the Proceeding on the part of the Chesapeake and Ohio Railway Company to Condemn Lands of the Ceredo Cemetery Company, Charles B. Hoard, Floyd Hoard, in Ceredo, Wayne county, for Railway Purposes.

And now come the said parties claimant, and not waiving the exceptions which they take to the jurisdiction of this court and the motion pending to remand the proceedings to the county court of Wayne Co. in the matter pending, for exception to the report of the viewers or commissioners therein, say that said report should be set aside and recommitted, because said report is insufficient and not in accordance with the provision of law. Because it takes into consideration, in estimating the value of the lands taken, the cost which may accrue to C. B. Hoard in protecting his premises, along which the railway of said company is to run. Because the amount found by said commissioners is insufficient compensation for the lands proposed to be condemned; and as to the compensation to be paid, the said parties claimant demand, pursuant to sec. 18, chap. 88, of Acts of 1872–3, that it be ascertained by an impartial jury of twelve freeholders selected according to law.

E. B. KNIGHT &
E. L. BUTTRICK,
Att'ys for C. B. Hoard and others.

37 And at another day of the same term of said court, to wit, at a court held on the 15 day of November, 1880.

This day the defendant, D. H. Baldwin, tendered his answer in this cause, which answer is ordered to be filed, and the plaintiff takes time to consider thereof. And the defendants, Samuel F. Hoard and the Ceredo Cemetery Co., severally moved the court to remand this cause to the county court of Wayne county, and to strike the same from the docket of this court as to the said two last-named defendants and each of them, which motion the court takes time to consider.

The answer of D. H. Baldwin, referred to in the foregoing order, is in the words and figures following, to wit:

Dist. Court, U. S. Dist. of West Virginia.

In the Matter of the Petition of The Chesapeake and Ohio Railway Company to Condemn Private Property for Public Use.

D. H. Baldwin, who is one of the parties cited to appear and show cause why the property described in said petition should not be taken by the said Chesapeake and Ohio Railway Company for the purposes named in said petition, saith that he has no interest,
38 either vested or contingent, equitable or legal, in the property by said company sought to be condemned. That at the time of the commencement of the proceeding aforesaid in the county court of Wayne county he had a mortgage upon part of the premises, given by Charles B. Hoard to secure him, the said Baldwin, in the payment of a certain bond of indemnity executed by the said Hoard to the said Baldwin. That in fact no liability ever existed on the part of said Hoard by reason of said bond, for the reason that the matter contemplated therein was never consummated, and no real consideration ever passed in fact from the said Baldwin to the said Hoard therefor, and that on the 1st day of March, 1880, said mortgage was by the said Baldwin fully discharged.

D. H. BALDWIN,
By E. L. BUTTRICK, *His Attorney.*

And at another day, to wit:

At a Court held at Charleston, in the District of West Virginia, of the the United States, on Thursday, May 26, 1881.

This day came the parties to this proceeding by their attorneys, and thereupon the motion of the defendants, the Ceredo Cemetery Association and Samuel Floyd Hoard, heretofore entered
39 herein, to remand this proceeding to the county court of Wayne county, being argued and considered, the court is of opinion to, and doth accordingly, overrule said motion, and doth refuse to remand this proceeding to the said county court as to the said Ceredo Cemetery Association and Samuel Floyd Hoard; and thereupon the matters arising on the objections of the Chesapeake and Ohio Railway Company to the plea in abatement to the jurisdiction of this court in this proceeding heretofore tendered by the defendant, C. B. Hoard, having been argued and considered, the court is of opinion to, and doth accordingly, sustain the objections to said plea, and the said plea is rejected; to which ruling and decision said defendant, C. B. Hoard excepted; and thereupon the defendant, C. B. Hoard, by his attorney, tendered another plea in abatement to the jurisdiction of this court in this proceeding, marked No. 2 to the filing of which the Chesapeake and Ohio Railway Company, by counsel, objected, and the said objection being argued and considered, the court is of opinion to, and doth accordingly, sustain the objections to said plea, and the said plea is also rejected; to

which ruling and decision said defendant, C. B. Hoard excepted. And thereupon came again the defendants, the Ceredo Cemetery Association and Samuel Floyd Hoard, and moved this court to remand this proceeding to the circuit court of Wayne county;
40 which motion, being argued and considered, is overruled, and the court refuses to remand this proceeding to said circuit court.

And it appearing to the court that there is in the hands of the clerk of the county court of Wayne county, to the credit of this proceeding, the sum of one thousand and seventy-six dollars and seventy-six cents, paid by the Chesapeake and Ohio Railway Company on the 8th day of May, 1880, it is ordered that the clerk of the county court of Wayne county do pay over the said sum to the clerk of this court, to be held by him, subject to orders to be made in this proceeding.

The said clerk is ordered to loan out the said sum, when it comes into his hands, until the next term of this court, taking good personal security from the person to whom the same is loaned, and requiring the payment of legal interest on the amount loaned until payment.

And thereupon the defendant, C. B. Hoard, tendered a bill of exceptions herein, which, being signed and sealed, is ordered to be filed as part of the record hereof.

The said bill is in the words and figures following, to wit:

On Application to Take Private Property for Public Use.

THE CHESAPEAKE AND OHIO RAILWAY CO.

vs.

C. B. HOARD and others.

Be it remembered that the defendant, C. B. Hoard, at the
41 spring term, 1880, of the court, tendered a plea in abatement, and moved the court to file the same, in the words and figures following, to wit:

District Court of the United States, District of West Virginia.

THE CHESAPEAKE AND OHIO RAILWAY CO.

vs.

C. B. HOARD and others.

And now comes the said C. B. Hoard, by Eustace Gibson and E. L. Buttrick, his attorneys, and saith that the said plaintiff ought not to have or maintain his petition removing this cause from the county court of Wayne county to this court and prosecute his suit herein, because he says that at the time the proceedings in said county court were commenced he was, ever since has been, and still is, a citizen of West Virginia; and this he is ready to verify.

Wherefore he prays judgment, &c.

C. B. HOARD.

Sworn to before me, this 19th day of May, 1880.

JASPER G. MOORE,
Clerk D. C. U. S., D. W. Va.

To the filing of which plea the plaintiff objected, which objection was at the spring term, 1881, argued and submitted to the
42 court, and the court sustained said objection, and refused to file said plea; to which ruling and judgment of the court in sustaining the plaintiff's objection to said plea, and in refusing to file the same, the defendant, C. B. Hoard, excepts.

And thereupon the said defendant, C. B. Hoard, tendered another plea in abatement, and moved the court to file the same, in the words and figures following, to wit:

THE CHESAPEAKE AND OHIO RAILWAY CO., Applicant, &c.,
vs.
C. B. HOARD and others.

And now comes the said C. B. Hoard in proper person, and saith that the said plaintiff ought not to have or maintain his petition, removing this cause from the county court of Wayne county to this court, and prosecute the same herein against him, because he says that at the time the proceedings in said county court were commenced, he was, ever since has been, and still is, a citizen of the State of West Virginia, and at the time aforesaid he was not, and never since has been, a citizen of the State of New York. And this he is ready to verify. Wherefore he prays judgment, &c.

C. B. HOARD.

43 STATE OF WEST VIRGINIA, }
Kanawha Co., } *ss:*

Charles B. Hoard, the defendant in the foregoing plea, being duly sworn, says that the facts and allegations therein contained, so far as they are stated on his own knowledge, are true, and that so far as they are stated upon information, he believes them to be true.

C. B. HOARD.

Taken, sworn to, and subscribed before me, this 23d day of May, 1881.

EDWARD B. KNIGHT,
Notary Public for Kanawha County, West Virginia.

UNITED STATES OF AMERICA,
District of West Virginia:

This 26th day of May, 1881, personally appeared before me, Jasper G. Moore, clerk of the district court of the United States for the district of West Virginia, Charles B. Hoard, who being duly sworn, deposes and says that the foregoing plea is true.

C. B. HOARD.

Given under my hand, the day and year above mentioned.

JASPER G. MOORE,
Clerk D. C. U. S., D. W. Va.

44 To the filing of which plea the plaintiff also objected, and said objection being argued and submitted, is also sustained, and the court refused to file said plea; to which ruling and judgment of the court sustaining the plaintiff's objection to said last-named plea, and in refusing to file the same the said defendant, C. B. Hoard, also excepted, and prays that his foregoing exceptions, and each of them, may be signed, sealed, and saved to him, which is accordingly done.

J. J. JACKSON. [SEAL.]

And at another day, to wit:

At a District Court of the United States for the District of West Virginia, held at Charleston, May 16, 1882.

This day Jasper G. Moore, clerk of this court, by Henry C. McWhorter, his deputy, tendered his report showing the amount of the the fund now in the registry of the court in this cause $1,071.76, subject to the order of the court, which report is ordered to be filed. And it is further ordered that the clerk of this court loan out said fund until the further order of the court.

And at another day, to wit:

45 At a District Court of the United States for the District of West Virginia, held at Charleston, May 3, 1883.

The defendant, C. B. Hoard, this day tendered his answer to the petition filed herein.

And at another day, to wit:

At a District Court of the United States for the District of West Virginia, held at Charleston, May 5th, 1883.

This day came the applicant, by W. H. Hogeman, its attorney, and the defendant, C. B. Hoard, by W. A. Quarrier and Messrs. Smith and Knight, his attorneys, and the applicant having objected to the filing of the answer of C. B. Hoard, tendered to the petition of the applicant herein on a former day of this term, the matters arising on the objections to said answer were fully argued by counsel for the respective parties; and in consideration thereof the court is of opinion to, and doth accordingly, sustain the objections to said answer, and doth refuse to permit the said answer to be filed; to which opinion and decision the defendant, C. B. Hoard, excepted.

MEM.—The defendant, C. B. Hoard, tendered a bill of exceptions herein, which, being signed and sealed, is ordered to be filed
46 and made part of the record of this proceeding. The said bill of exceptions is in the words and figures following, to wit:

Be it remembered, that on the —— day of May, 1883, the defendant, C. B. Hoard, tendered his answer to the plaintiff's petition in this cause, which said answer is in the words and figures following, to wit:

The Answer of C. B. Hoard to a Petition originally filed in the County Court of Wayne County, West Virginia, against Him and Others, for the Purpose of Condemning Private Property for Public Use, and which Petition and the Proceedings thereon have been transferred to the United States District Court for the District of West Virginia, sitting at Charleston.

To the Hon. John J. Jackson, judge of said court:

The defendant, answering, says, that heretofore, to wit, about the year 1867, the Chesapeake and Ohio Railroad Company was incorporated and duly organized by the Legislature of West Virginia, with power and authority to construct and operate a railroad from Richmond, in the State of Virginia, to the mouth of Big Sandy river, in the State of West Virginia; that before the year 1873 the said railroad was located by the said company through the village of Ceredo, in Wayne county, West Virginia, and through a large number of town lots in said village, the property of this defendant, and through a large number of the streets of said village, by and with the consent of said village. And that after the said company had so legally located the line of their said road through the said village, and through the streets, and through the town lots belonging to the respondent, the said respondent and the said company, on the 28th day of July, 1873, entered into a written contract, regulating the right of way of said railroad through said village, its streets and through the lands and lots of said respondent, and agreeing upon the value thereon and the damages done to the residue of respondent's property; the said contract was sealed with the seal of said company and signed by its president and secretary, they thereto being duly authorized, and was also signed and sealed by the said respondent. A printed copy of said contract is here filed, and marked Exhibit "B." By an inspection of said contract it will be seen
48 that its provisions and covenants are very valuable to the respondent, if said provisions and covenants had been fairly and honestly observed and carried out. The money consideration, ($1,000.00) one thousand dollars, though the contract recites its payment, has never been paid.

The said money consideration is the smallest in value of the covenants and premises in said contract contained. Respondent then was, and now is, the owner of the larger portion of the lots in said village of Ceredo. The construction of the road through Ceredo, upon the line as located by the company, together with the construction of the depot and station-house in said village, near the Ceredo House, and its maintenance and use, and the construction and maintenance of the sidings in said contract provided for, would have been, and will be, of inestimable benefit and pecuniary advantage to the respondent.

Respondent alleges that if said contract had been or was now carried out in good faith, the effect would be to enhance the value of said town lots and other property owned by him, in and near the town of Ceredo, more than $20,000.

Respondent alleges that, in pursuance of said contract, the

49 company, by its duly authorized agents and officers, took possession of the line so located by it through said village and through the lots and property of said respondent, and made large and extensive excavations and fills through the same, and partially graded its line through said property, in accordance with the provisions of said contract.

Respondent further alleges that, subsequent to the transactions above enumerated, a bill was filed in the circuit court of Kanawha county to foreclose certain mortgages theretofore executed by the said Chesapeake and Ohio Railroad Company upon all of its property and franchises; that there was a decree of sale, a sale, and confirmation of the sale, and a deed was executed to A. S. Hatch, C. P. Huntington, A. A. Low, Isaac Davenport, Jr., and John Catren, who, by virtue of such deed and the law, became a corporation by the name of "The Chesapeake and Ohio Railway Company," and entitled to all the works, property, estate, rights and franchises theretofore owned and possessed by the Chesapeake and Ohio Railroad Company, and subject to all the restrictions imposed by law upon said last-named company.

Respondent further alleges that in the month of October, 1879, the new railroad company, in direct violation of the contract
50 of 28th July, 1873, and in palpable violation of law, abandoned its partially completed and located line through the village of Ceredo, and located a new line through the lands of respondent and the Ceredo Cemetery Company, outside and back of the village of Ceredo, and separated therefrom by a deep ravine. On 6th October, 1879, these proceedings in condemnation were filed in the county court of Wayne county, to condemn the new line.

Respondent alleges that the petitioner has no right to have the land condemned which is described in and sought to be condemned by the petition, and assigns the following reasons therefor:

1. These proceedings are had under and by virtue of chapter 88 of the Acts of West Virginia, passed in the year 1873, (page 213.) The law of West Virginia only authorizes the proceedings in condemnation when the parties failed to agree upon compensation for the land taken and damages to the residue of the tract. In this case the parties had agreed fully, and the company had entered and partially constructed their line.

2. The railroad company who has established the line can-
51 not change its grade or location, except for adequate cause. No cause, adequate or otherwise, is alleged in the petition for the change of location.

Respondent therefore denies that the land sought to be taken for public use in these proceedings is liable to be so taken, or that the case made by the petition is one that authorizes the taking of private property for public use; and that the petition and all proceedings thereunder are in violation of the laws of West Virginia, the constitution of said State, and the Constitution of the United States.

Respondent, having fully answered, prays that the petition may be dismissed with costs.

C. B. HOARD, *By Counsel.*

SMITH & KNIGHT, QUARRIER, *Sol's.*

KANAWHA COUNTY, *to wit:*

C. B. Hoard makes oath that the allegations in the foregoing answer, so far as they are made on his own knowledge, are true, and so far as made on the information of others, he believes them to be true.

Given under my hand, this 2d day of May, 1883.

J. D. BAINES,
Notary Public in and for Kanawha County, West Virginia.

52 (Exhibit "B," filed with the foregoing answer, is the contract of July 28, 1873, hereinbefore copied as an exhibit with the bill.)

To the filing of which the plaintiff objected, and its objection being referred to the court, the court sustains said objections, and refused to allow said answer to be filed.

To which opinion and action of the court the defendant Hoard objects and excepts, and these his exceptions are signed, sealed, and reserved to him.

J. J. JACKSON. [SEAL.]

The following bill of exceptions is found in the file of said papers, in words and figures following, to wit:

C. AND OHIO RAILWAY CO.
vs.
C. B. HOARD & *als.*
} On Application, &c.

Be it remembered, that on the 10th day of May, 1882, the defendant, C. B. Hoard, tendered an answer to the petition in this case, which is in the following words:

The Answer of C. B. Hoard to a Petition originally filed in the County Court of Wayne County, West Virginia, against Him and Others, for the Purpose of Condemning Private Property for Public Use,
53 *and which Petition and the Proceedings therein have been transferred to the United States District Court for the District of West Virginia, sitting at Charleston.*

To the Hon. John J. Jackson, judge of said court:

The said defendant, for answer to said petition, says:

That the real estate in the petition described, the private property of the defendant, and which is sought to be taken by the plaintiff for an alleged public use, cannot be so lawfully taken, for the alleged public use in said petition described. And this he is ready to verify.

SMITH, KNIGHT, QUARRIER, *P. D.*

And thereupon the plaintiff objects to the filing of the same, and said objection having been referred to the court, the court sustained said objection, and refused to allow said answer to be filed.

To which opinion and action of the court the defendant, C. B.

Hoard, excepts, and his exceptions are signed, sealed, and reserved to him.

J. J. JACKSON. [SEAL.]

54 Exhibit No. 3, filed with the said bill, is in the words and figures following, to wit:

At a District Court of the United States for the District of West Virginia, held at Charleston, May 17, 1880.

CHESAPEAKE AND OHIO RAILWAY CO.
vs.
C. B. HOARD, D. H. BALDWIN, THE CEREDO CEMETERY ASSOCIATION, and SAMUEL FLOYD HOARD. } In Chancery.

This day came the Chesapeake and Ohio Railway Company, by Wm. H. Hogeman, its attorney, and presented a bill duly sworn to, praying for an order of injunction, inhibiting, restraining, and enjoining C. B. Hoard, D. H. Baldwin, the Ceredo Cemetery Association, and Samuel Floyd Hoard, and each of them, and their and each of their agents, attorneys, and employees, and all others, from interfering or from causing or permitting others to interfere, by suit or otherwise, with the complainant, its officers, agents, contractors, servants, and employees, from entering upon, using, and enjoying, the two tracts of land, or either of them, described in the report of the commissioners, filed in the condemnation proceeding instituted originally in the county court of Wayne county, West Vir-
55 ginia, by the complainant against said defendants, or from doing or causing to be done anything tending to such interference; and thereupon said bill is ordered to be filed.

And the said bill being considered, it is ordered that the injunction be allowed as prayed for in the bill; and this cause is set down for further hearing until the first day of the next term of this court, to which time this injunction is continued in force. But before this injunction takes effect, the complainant, or some responsible person for it, shall give bond with good security in the sum of $2,000, conditioned according to law.

A copy. Teste: JASPER G. MOORE,
Clerk D. C. U. S., D. W. Va.

The writ of subpœna issued in said cause is in the words and figures following, to wit:

The President of the United States of America to the Chesapeake and Ohio Railway Company:

We command you, that on the first Monday in June next, at rules to be held in the clerk's office of the district court of the United States for the district of West Virginia, at Charleston, laying all other matters and excuses aside, you do cause an appearance to be entered for you, in the said court, to a bill in chancery filed
56 against you by C. B. Hoard, a citizen and inhabitant of the State of West Virginia, and that you do answer concerning

such things as shall then and there be alleged against you, and observe what the court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process of contempt as the said court shall award.

Witness the Hon. John J. Jackson, judge of the said court, at Charleston, this 5th day of May, A. D. 1883, and in the 107th year of the independence of the United States of America.

[L. S.] Teste: JASPER G. MOORE,
Clerk District Court U. S., District W. Va.

Memorandum: The defendant is to enter its appearance in the suit mentioned in the foregoing writ, in the clerk's office therein mentioned, on or before the day on which the said writ is returnable; otherwise the bill will be taken *pro confesso*.

Teste: JASPER G. MOORE,
Clerk D. C. U. S., Dist. W. Va.

And at another day, to wit:

At a District Court of the United States for the District of West Virginia, held at Charleston, Monday, May 7, 1883.

57 C. B. HOARD
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY. } In Chancery.

This day came the complainant, by W. A. Quarrier and Smith & Knight, his attorneys, and thereupon the defendant, the Chesapeake and Ohio Railway Company, by W. H. Hogeman, its attorney, waived the service of process herein, and tendered a demurrer in writing to the complainant's bill, with a waive of the affidavit and certificate required by the rules of this court thereon endorsed, which demurrer was set down for argument; and thereupon, the matters arising on said demurrer having been argued by counsel for the respective parties, and considered by the court, it is adjudged, ordered, and decreed, that the defendant's demurrer to the complainant's bill herein be, and the same is hereby, sustained, and that the injunction prayed for by the complainant in his bill be, and the same is hereby, refused; and the plaintiff not desiring to amend his aforesaid bill, it is further adjudged and ordered that the complainant's bill be dismissed, and that the defendant recover of the plaintiff its costs in and about its defence herein expended.

The demurrer referred to in the foregoing order is in the words and figures following, to wit:

58 *The Demurrer of the Chesapeake and Ohio Railway Company to the Bill of Complaint of C. B. Hoard, the above-named Plaintiff.*

C. B. HOARD
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY. } In Chancery.

The defendant, by protestation, not confessing all or any of the

matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that the plaintiff hath not, in and by his said bill, made or stated such a case as entitled him, in a court of equity, to any relief against it as to the matters contained in the said bill, or any of such matters, and that the said bill does not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf
59 most wrongfully sustained.

CHESAPEAKE AND OHIO RAILWAY CO.,
By Counsel.

WM. H. HOGEMAN, *Counsel for Def't.*

Affidavit and certificate waived.

QUARRIER, *For Comp't.*

And now at this day, to wit:

At a District Court of the United States for the District of West Virginia, held at Charleston on the day and year first herein mentioned, to wit, on Thursday, the 10th day of May, 1883.

The complainant in this cause having prayed that an appeal be awarded him to the Supreme Court of the United States, said appeal is hereby awarded upon condition that the complainant execute an appeal bond with good security before the judge of this court within sixty days, conditioned according to law in the penalty of $500.

Bond.

Know all men by these presents, that we, Charles B. Hoard
60 and Zophar D. Ramsdell, of Ceredo, of Wayne county, State of West Virginia, are held and firmly bound unto Chesapeake and Ohio Railway Company in the just and full sum of five hundred (500) dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents, sealed with our seals and dated this 16th day of June, 1883.

The condition of the above obligation is such, that whereas the above-named Charles B. Hoard has prosecuted an appeal to the Supreme Court of the United States to reverse a judgment of the district court of the United States for the district of West Virginia, holden at Charleston, rendered by the Honorable John J. Jackson, judge of the said court, in a chancery suit pending in said court, in which said Charles B. Hoard is complainant and Chesapeake and Ohio Railway Company is defendant.

Now, therefore, if the said Charles B. Hoard, the complainant in

said suit, shall prosecute the said appeal to effect and answer all costs and damages if he should fail to make good his plea,
61 then this obligation to be void, else to remain in full force.

CHARLES B. HOARD. [SEAL.]
Z. D. RAMSDELL. [SEAL.]

Acknowledged before me and approved—
J. J. JACKSON, *District Judge.*

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, hereby certify that the foregoing is a true and correct transcript of the record and proceedings of a cause in chancery lately pending in my said court at Charleston, wherein Charles B. Hoard was complainant and Chesapeake and Ohio Railway Company was defendant, including a copy of the appeal bond executed and filed in said cause.

In witness whereof, I have hereto subscribed my name and affixed the seal of my said court at Charleston, this 16th day of August, A. D. 1883.

[SEAL.]

JASPER Y. MOORE,
Clerk, Dist. C't U. S., D. W. V.

Fee of clerk for this record is $26.50.

Endorsed: Transcript of record. Chas. B. Hoard *vs.* Chesapeake and Ohio Railway Company.

Endorsed on cover: West Virginia D. C. U. S. No. 1193. Charles B. Hoard, appellant, *vs.* The Chesapeake and Ohio Railway Company. Filed 31st October, 1883.

In the Supreme Court of the United States.

[October Term, 1887.]

CHAS. B. HOARDS, *Executor Appellant*,

vs.

THE CHES. & OHIO RAILWAY CO.

No. 17.

EXTRACT FROM CHAPTER 88 OF THE LAWS OF WEST VIRGINIA OF 1872 AND 1873.

CHAPTER LXXXVIII.

The title of the Act is as follows, to-wit:

An Act to provide for the incorporation of associations that may be organized for the purpose of constructing railroads, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporations when so organized.

Be it enacted by the Legislature of West Virginia:

* * * * * * * *

18. If any such corporation shall be unable to agree with the owner for the right of way, or for the purchase of any real estate required for the purposes of its corporation, or the transaction of its business, or for its deposits, station buildings, machine and repair shops, or for right of way, or any other lawful purpose connected with, or necessary to, the

building, operating, or running of said railroad and branches, such corporation may acquire such title in the manner as hereinafter provided, viz: the court of any county wherein the land or material to be taken may be, upon application therefor, shall appoint five disinterested persons, (any three of whom may act) for the purpose of viewing and ascertaining a just and equitable compensation for the quantity of land actually taken by said railroad corporation, (but in no case shall the court appoint any person or persons through whose land said railroad is to pass, nor any person interested in the construction of said railroad), and the sheriff of the county, after such appointment is made, shall summon the said viewers to meet on the land at such time as they may appoint, within thirty days after such appointment, giving twenty days' notice to the parties interested, unless such parties shall be non-residents of this State, in which case notice shall be given to such non-residents, by publication for four consecutive weeks in some newspaper published in some county through which it is proposed to construct such railroad, and if none be so published, then in some other newspaper published in this State; and such viewers shall not meet for the purposes of their appointment until the publication herein prescribed shall have been completed. The viewers aforesaid shall, before proceeding to perform the duties aforesaid take an oath before some person authorized to administer an oath, that they and each each of them will honestly, fairly, and impartially ascertain and determine the amount said railroad corporation shall pay for the land actually taken, as aforesaid, and return their report, signed

by them, to the clerk of the court prior to the first day of the next term thereafter, wherein the proceeding is pending, setting forth therein the amount to be paid for the land so taken or to be taken by the said railroad corporation. And in estimating the value or damages on account of the land actually taken, the commissioners or jury, as the case may be, shall determine its actual value, without reference to any prospective enhancement by reason of the construction of any work for which the land is to be taken, and shall not diminish the value by reason of such construction; and in all such cases the value or damages, as aforesaid, shall be determined by the actual and true value of the land to be taken. On said first day of said term the *court shall direct judgment to be entered on said report for the amount therein ascertained and determined by said viewers, if no exceptions be taken and filed*. but if exception be taken and filed thereto (and when required by either of the parties), such compensation shall be ascertained by an impartial jury of twelve free-holders, selected according to law. The right is hereby given to said railroad corporation to object, and its objection shall be sustained, to any juror who may be an owner or interested in land over or through which said railroad will pass. The cause, or proceeding, shall be tried as any other cause in said court, and the said viewers, as well as the jury aforesaid, who may try the cause or proceeding, shall, by their award or verdict, as the case may be, ascertain and determine the amounts to be paid by the railroad corporation for the land actually taken, and no more; and the damages to the residue of the tract, if any, may be offset and

compensated for by any peculiar benefit to said residue which may arise by reason of the construction of said railroad or any work necessary for the running and operation of the same.

19. Any such corporation may, by their agents and employees, enter upon and take from any land adjacent to its road, earth, gravel, shale or stone necessary for the construction of said railroad, paying, or securing to be paid, if the owner of such land and the said corporation can agree thereto, the value of such material taken and the amount of damage occasioned thereby to any such land or its appurtences; and if such owner and corporation cannot agree, then the value of such material, and the damage occasioned to such real estate, may be ascertained, determined and paid, or secured to be paid, in the manner prescribed in section eighteen of this act; but the value of such materials, and the damage to such real estate shall be ascertained, determined and paid or secured to be paid, before such corporation can enter upon or take the same.

20. Every corporation formed under this act shall, in addition to the powers herein before conferred, have power:

FIRST. To cause such examination and survey for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers, agents, engineers or employees, may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damages which shall be occasioned thereby.

SECOND. To take and hold such voluntary grants of real estate and other property as shall be made to it, in aid of the construction and use of its railroad,

and to sell and convey the same when no longer required for the uses of such railroad, not incompatible with the terms of the original grant.

THIRD. To purchase, hold and use all such real estate and other property as may be necessary for the construction and use of its railroad, and the stations and other accommodations necessary to accomplish the object of its incorporation, and to sell and convey the same when no longer required for the use of such railroad.

FOURTH. To lay out its road, not exceeding one hundred feet in width, and to construct the same; and for the purpose of excavations and embankments, to take as much more land as may be necessary for the proper construction, repair and security of the railroad; and to cut down any standing trees that may be in danger of falling upon or obstructing the railroad, making compensation therefor in the manner provided by section eighteen of this act.

FIFTH. To change the grade or location of its railroad, not departing from the *general* route specified in the articles of incorporation, for the purpose of avoiding annoyances to the public travel, or dangerous or difficult curves or grades, or unsafe or impracticable and unsubstantial grounds or foundations, or for other like reasonable causes.

SIXTH. To construct its railroad across, along or upon any stream of water, water course, street, highway, road, turnpike or canal, which the route of such railroad shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, road, canal or turnpike, thus intersected or touched, to its former state, or to such state as not unnecessarily to have impared its usefulness, and to

keep such crossing in repair. Nothing in this act contained shall be construed to authorize the erection of any bridge or any other obstruction across or over any stream navigable by steamboats at the place where any bridge or other obstruction may be proposed or placed so as to prevent the navigation of such stream; nor to authorize the construction of any railroad upon or across any street in any city or incorporated town or village without the assent of the corporation of such city, town, or village; *Provided*, That any company running its railroad through or within half a mile of a town or a village within this State containing three hundred or more inhabitants, shall establish a station for the accommodation of trade and travel of such town or village; and provided further, That in case of the construction of said railroad along highways, roads, turnpikes, or canals; such railroad shall either first obtain the consent of the lawful authorities having control or jurisdiction of the same, or condemn the same under the provisions of section eighteen of this act; and provided further, that nothing in this act shall be construed to authorize the incorporation of any railroad company, the purpose and effect of which is to connect two other railroads and thereby abandon as through routes any city or town of this State, which is the terminus of either or both of said railroads, without the consent of such city or town.

SEVENTH. To cross, at grade, or to cross over or under, intersect, join, and unite its railroad with any other railroad now built and constructed, or hereafter to be built and constructed within this State, at any point on its route, and upon the grounds of such other railroad company, with the necessary

turnouts, sidings, and switches, and other conveniences in furtherance of the objects of its connections; and every corporation whose railroad is or shall be hereafter intersected by any new railroad, shall unite with the corporation owning such new railroad in forming such intersection and connections, and grant the facilities aforesaid; and, if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossing and connections, the same shall be ascertained and determined in the manner prescribed by section eighteen of this act.

EIGHTH. To receive and convey persons and property on its railroad by the power and force of steam or animals, or by any mechanical power.

NINTH. To erect and maintain all necessary and convenient buildings and stations, fixtures and machinery for such connections, constructions, transfer, accommodation and use of passengers, freights and business interests, or which may be necessary for the construction or operation and repair of said railroad, its track, roadway and machinery.

TENTH. To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor, subject, nevertheless, to the provisions of any law that has been or may be hereafter enacted.

ELEVENTH. From time to time, to borrow such sums of money as may be necessary for completing, finishing, improving, or operating any such railroad, and to issue bonds, bills of credit or indebtedness and preferred stock, and dispose of the same, for any amount so borrowed, and to mortgage its corporate property and franchises, to secure the pay-

ment of any debt contracted by such corporation for the purposes aforesaid, but the concurrence of the holders of two-thirds in amount of the stock of such corporation, to be expressed in the manner and under all the conditions provided in section fifteen of this act shall be necessary to the validity of any such mortgage; and the order or resolution of such mortgage shall be recorded as provided in section two of this act; and the directors of such corporation shall be empowered, in pursuance of any such order or resolution, to confer on any holder of any bond for money so borrowed as aforesaid, the right to convert the principal due or owing thereon into stock of such corporation, at any time not exceeding ten years after the date of such bond, under such regulations as may be provided in the by-laws of such corporation.

* * * * * * *

39. Any railroad company organized under this act may build and construct lateral and branch roads, or tramways, and of any guage whatever, not exceeding fifty miles in length, and may build planes and gravity roads, use and operate any part or portion of their said main line and branch or branches, when completed, the same as though the whole of their said proposed railroad was fully completed; and, in the construction of their bridges across any river or navigable stream, may provide for the passage of wagons and other travel, collecting tolls therefor as prescribed by law; and may erect and operate a telegraph line or lines, with the right to use, control and operate the same along the line of their said railroad and branches, and connecting with any of their said works, offices and improvements.

40. Any railroad company, or any persons, or bod-

ies corporate or politic whatever, in or out of this State, heretofore or hereafter incorporated, may, at any time, by means of subscription to the capital stock of any other company, or by the indorsement of each other's bonds, or by an exchange of or guarantee of bonds and stocks, or the interest thereon, and of each other, or by a loan of its credit thereto, or otherwise aid and assist such company in the construction of its railroad, works and improvements: Provided, that no such loan, indorsement of, or aid, shall be extended, granted and given, until the consent of two-thirds of the stock held by said companies, respectively, which shall have been organized under the laws of this State, shall be given at a meeting of the stockholders of such companies held for that purpose, they shall authorize and instruct their board of directors to enter into such agreement.

41. Any railroad company heretofore organized and extending into, and through this State, or that may organize under this act, shall have power and authority to build and construct their line of railroad, branch or branches, through any gorge, defile, causeway, or narrow ravine, along any stream or river, by, over, under, near to, by the side of, or through any house, out-house, building or enclosure —burial grounds and cemeteries excepted—by paying or securing to be paid for all such, or the damage occasioned thereto, as shall be agreed upon by the company, and the party or parties, owner or owners, such amount or price therefor as shall be mutually agreed upon by and between the parties in interest, and in case they shall fail to agree upon terms of settlement for such damage, their adjustment and settlement shall be made as herein provided.

42. All general laws of this state in relation to railroad corporations, and the powers and duties thereof so far as the same are not inconsistent with the provisions of this act, shall remain in force and be applicable to railroad corporations organized under this act: Provided, that any railroad corporation or improvement company, incorporated by the laws of this State, and organized since the first day of January, 1872, may accept the provisions of this act, and reorganize hereunder without impairing any rights or privileges granted in their original acts of incorporation, subject, however, to the control of the legislature, as prescribed by the constitution: Provided, however, that two-thirds of the persons named as incorporators of such companies shall sign articles of incorporation, and proceed as required in section two of this act, and give notice to all incorporators and stockholders as required in section fifteen of this act, after which such organization shall be held to be the legitimate and only valid organization of such company.

43. Nothing in this act shall be so construed as giving to any company that may be organized under the provisions of this act, the right to take away or interfere with the rights or franchises of any existing legally organized corporation, granted to it by its charter or any previous law of this State, or which has been legally acquired by such corporation in a legal manner: Provided, that this section shall not be so construed as to apply to corporations chartered since the first day of January, 1872, that may be reorganized in accordance with the provisions of section forty-two of this act.

44. Hereafter the words "internal improvement

company," and companies "incorporated for the construction of works of internal improvement," shall not be so construed as to apply to associations incorporated for the construction or management of railroads within this State, unless such construction shall have been or shall be expressly stated and set forth by law.

123-222

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

CHARLES B. HOARD'S EXECUTORS,
Appellants,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

No. 17.

ENOCH TOTTEN,
For Appellant.

R. O. POLKINHORN, PRINTER.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

CHARLES B. HOARD'S EXECUTORS, *Appellants*,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

No. 17.

Brief for Appellant.

This is an appeal from the judgment of the District Court of the United States for the District of West Virginia, sustaining a demurrer to an original bill in that court, filed May 3, 1883.

The bill substantially alleges:

That the Chesapeake and Ohio Railroad Company was organized by the authority of an act of the Legislature of West Virginia in 1867, with power to construct and operate a railroad from Richmond, in Virginia, to the mouth of the Big Sandy, in West Virginia.

That prior to 1873 that company located its railroad through many of the streets of the village of Ceredo, in West Virginia, and through many town lots owned by the complainant; that on the 28th of July, 1873, an agreement in writing and under seal

was entered into between the railroad company and the complainant, fixing the terms upon which the railroad might be constructed through the complainant's lots and the damages to be paid to him for the "right of way" over said lots; that the amount of such damages to be paid to the complainant was $1,000.00, but that the same was never paid; that the company, in fulfilment of its obligations under the agreement, took possession of the line of railroad as located, and partially graded the road and made extensive excavations and fills in accordance with the terms of the contract; that the complainant was the owner of the larger portion of the lots in Ceredo, and that the construction of the railroad on the line as located through Ceredo, with its sidings, stations, &c., would have been of inestimable value to the lots belonging to him, and that if constructed would have enhanced the value of his lots more than $25,000.00.

That in a suit in a State Court of West Virginia to foreclose a mortgage made by the railroad on its property and franchises a decree for a sale of said railroad was passed, and that a sale was made and consummated thereunder, and that a deed was executed to certain persons who, by virtue of "such deed and the law," became a corporation by the name of the "Chesapeake and Ohio Railway Company;" that in October, 1879, this new company, although well knowing the subsistence of the agreement between the complainant and the former corporation, and in violation of its covenants, abandoned the partially completed railroad line through the village of Ceredo and located a new line outside of the settled part of the village and separated from it by a deep ravine, and through other lands of the

complainant; that the new company, on the 6th of October, 1879, instituted proceedings in the County Court of Wayne County, to condemn the lands through which the line had been by it so located; that Commissioners were appointed, a report was made fixing the amount of damages to be paid, and that the amount so fixed was paid into court, and that upon the application of the company, such proceedings were removed from the County Court of Wayne County to the United States District Court for the District of West Virginia. That upon the authority of these proceedings, the company took possession of the new line, and constructed its railroad, and was daily running many trains over it, both of passenger and freight.

The complainant avers that the condemnation proceedings are null and void, and that the construction and use of the railroad on the new line was a trespass upon his lands, and that the daily use and operation of the railroad over them is a continuing trespass, and he prays that his contract of July 28, 1873, may be specifically performed and enforced, and that the defendant may be compelled to permanently establish and operate its railroad through the village of Ceredo, and to erect and maintain a depot according to the terms of the agreement: and that it may be compelled to pay the $1,000, with interest, and in all things to perform and keep the covenants in said agreement; and that the company may be enjoined from taking any further steps under the condemnation proceedings, and from running trains, &c., over the new line. A copy of the agreement is attached to the bill as a part thereof.

A copy of the record of the County Court in the

condemnation proceedings, which was sent to the District Court, is attached to the bill as an exhibit, and the complainant specifies three objections to their validity:

1. That the statute of West Virginia, under which they were instituted, authorize the proceedings only in cases where the parties fail to agree, and that in this case they had agreed and had reduced their agreement to writing and signed and sealed it.

2. That, according to the law of West Virginia, a railroad line or route once established cannot be changed, except for adequate cause.

3. That there is no judgment or decree of any court authorizing the company to take the land, and without such authority the defendant had no right to enter upon his lands, or to construct or operate a railroad thereon.

The complainant also attaches to his bill as an exhibit, an order of the United States Court (26), issued May 17, 1880, upon a bill filed by the defendant company for that purpose, enjoining and restraining the appellant, and others who were made defendants, and their agents, attorneys and employees, from interfering, *by suit or otherwise*, with the complainant, the railway company, its officers, agents, &c., in entering upon, using or enjoying the land described in the report of the commissioners in the condemnation proceedings, originally instituted in the County Court of Wayne County, or from doing or causing to be done anything tending to such interference. Upon this injunction the appellant relied for jurisdiction of the Federal Court in the premises, and makes the averment following:

"And inasmuch as this court has heretofore prohibited the complainant, by injunction, from obtaining any relief in the State Courts in regard to the matter here complained of, as will be seen by a copy of the order of this court here filed, marked Exhibit No. 3, complainant is only relievable in this court." (3.)

In order to a proper understanding of the case an examination of the proceedings for condemnation instituted in the County Court, upon which this cause rests, and the method of removing such proceedings to and retaining them in the Federal Court is necessary.

On the 6th of October, 1879, the railway company, the appellee, presented its petition to the County Court of Wayne County, in West Virginia, praying that the proceedings authorized by law, for the purpose of condemning lands for railroad purposes, might be had, having given previous notices of such application, to the parties interested. (9, 10, 11.) On the 7th of April, 1880 (12), an order was made by the County Court, appointing commissioners to ascertain and report a just compensation for the lands; this resulted in a report (13) dated April 28, 1880, fixing the compensation at $1,075.00; this amount, with interest, was paid into court on the 8th of May, 1880, by the company.

On the 17th of May, 1880, at the early hour of 5 o'clock A. M. (15), the company presented its petition and bond to the County Court, asking for the removal of the cause to the District Court of the United States for the District of West Virginia, alleging as a ground thereof that the suit was between citizens of different States; that the company was

a citizen of both Virginia and West Virginia, and that the appellant and D. H. Baldwin, one of the parties in the condemnation proceedings, were citizens of the State of New York, and that S. Floyd Hoard and the Ceredo Cemetery Association, the remaining owners of the lands, were citizens of West Virginia. With this petition the required bond was filed, and the cause seems to have been removed, according to the prayer of the petition, to the District Court. On the 19th of May, 1880, the appellant appeared in the said District Court, and presented an answer or plea to the petition for removal, which was by him signed and sworn to (17, 20, and 21), denying that he was a citizen of New York, as alleged, and asserting that he was, at the time the condemnation proceedings were instituted, and ever since had been, a citizen of West Virginia. Objection was made to the filing of this answer, and time was taken by the court to consider the matter, but an order was then made allowing thirty days within which to file exceptions to the report of the Commissioners made to the County Court, as to the compensation to be paid for the lands (17). On the 15th of November, 1880 (18), D. H. Baldwin filed a disclaimer, alleging that he had not then, and never had, any interest whatsoever in the lands in question. The appellant and others subsequently filed exceptions (18) to this report, specifying several objections, one of which was insufficiency of the amount of damages awarded by the Commission, and they united in demanding that the amount of compensation be ascertained by a jury. On the 26th of May, 1881, the answer of the appellant to the petition for removal was argued and "rejected" by the court (19), and at the same time

a motion to remand the cause, as to them, to the County Court, made by two other defendants, was overruled; the appellant forthwith filed another answer or plea to the same effect as the first (21), and it was also rejected (19). On the 10th of May, 1882 (25), the appellant tendered another answer to the petition, and also on the 3d of May, 1883 (22), he tendered still another, but objection being made, the court *refused to permit them to be filed* (22, 25), as the record states.

A demurrer to the bill under consideration was interposed and, on argument, it was sustained by the court, and no amendment being offered, the bill was dismissed (27.) From this decree the complainant appealed, and says, by way of—

Assignment of Error,

The court below erred in sustaining the demurrer for want of equity.

Points and Authorities.

The bill was not without equity, and the demurrer should have been overruled.

First. There was no judgment nor decree of any court authorizing the railway company to enter upon the land in dispute, and to construct and operate its railroad, and it was a mere trespasser in so doing.

The general law of West Virginia, relating to the incorporation of railroad companies, and to their construction and maintenance, in force when these proceedings took place, was enacted on the 6th of

April, 1872, and is known as Chap. 88 of the Laws of 1872–3. The 18th Section of this act, after providing for the appointment of commissioners to condemn lands for railroad purposes, and the proceedings to be had on the coming in of their report, provides as follows:

"The said court shall direct judgment to be entered on said report for the amount therein ascertained and determined by said viewers, if no exceptions be taken and filed; but if exception be taken and filed thereto, and when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve free holders, selected according to law." * * * "The cause or proceeding shall be tried as any other cause in said court." (p. 222–23.)

The appellee appears to rely for its right to seize and take possession of the land upon the report made and filed in the State Court by the Commissioners appointed to ascertain the compensation and the subsequent *payment* of the money into court, upon Section 20 of Chapter 42 of the Code of West Virginia. But it has been authoritatively decided by the Supreme Court of Appeals of that State that this proceeding is not governed by the code, but by the provisions of Chap. 88 of the laws of 1872–3, above cited.

It seems that this decision was made in this very matter and between these very parties.

The Court says:

"The object of Chapter eighty-eight, acts of 1872–3, is made plain in the title. It cannot be misunderstood from the title and the act itself that the

legislature intended to pass, by Chapter eighty-eight, a general act *applicable to railroads alone*, and thus withdraw railroad associations or companies as fully as possible from the provisions of the code governing corporations in general."

(The Chesapeake & O. Railway Co. *vs.* Hoard, 16 W. Va., R. 270–273.)

There is no provision in Chapter 88 of this act authorizing the payment of money into court and thereby authorizing possession; and it is plain from an examination of the statute that the company was without authority for, and was clearly a trespasser in, entering upon the appellant's property, and that its daily use of its railroad over the property was a continuing nuisance which entitled the injured party to an injunction. In addition to this, it may be asserted, as a legal conclusion, that there had been no binding ascertainment of the amount of compensation in the case, because the parties filed exceptions and also demanded that the damages should be ascertained by the intervention of a jury, as they had a right to do by the statute above quoted. The demand for a jury was made at the proper time. (Ches. & O. R'y Co. *vs.* Patton, 9 W. Va., 648–654.) Furthermore, it does not appear that the exceptions to the report were ever acted upon by the court. These proceeding were, therefore, wholly ineffectual so far as title and right of possession in the railway company was concerned. The complainant in this bill, therefore, had a plain right to an injunction to protect him from the encroachments of the defendant, and, for this reason alone, the bill was not demurrable.

Second. The contract of July 28, 1873, annexed to the bill, was binding upon the new company, as well as on the complainant, and it was one of its *duties* to observe it, and the complainant has a right to a specific performance thereof in equity; a remedy at law, by an action for damages, would be inadequate.

The binding force upon the new company of this agreement follows from the provisions of the statute upon that subject, by which the old corporation is dissolved and the new one created, and by which its duties, &c., are defined. It is the second section of the act of the Legislature of West Virginia, relating to sales of railroads made under mortgages, deeds of trust, &c., approved February 18, 1871, (laws of 1871, p. 91,) which provides as follows:

"The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights, and privileges, and perform all such *duties* as would have been had, or should have been performed by the first company, but for such sale and conveyance, save only that such corporation so created shall not be entitled to debts due to the first company, and shall not be liable for any debts of or claims against the said first company, which may not be expressly assumed in the contract of purchase." This statute was made to include sales made under decrees, by the act of 1877 (p. 14, Laws of 1877). One of the first "duties" this new company was bound to perform was to complete the railroad where it was left incomplete by its predecessor.

The sale of the franchise and property of the old

company, including its road-bed, was made pursuant to a decree of a State Court, and they passed thereby to the new. So far as the road-bed was concerned, the new company had no more right to change the established line than the old company would have had. The road passed to the new company just as it was at the time of the sale. The line had been definitely located through the village of Ceredo, and had been partially completed. The land of the complainant and the streets and alleys of the village had been taken and appropriated by the old company in pursuance of the agreement with the proper parties. There can hardly be any doubt that the agreement with the old company bound Hoard as to the completion of the road by the new company. It should seem that it must be binding on the new company also. The right of eminent domain granted to a railroad corporation cannot be twice exercised; the power is exhausted when once exercised. The old company had exercised all the power given by law in that direction. It would be a hardship, indeed, if a railroad corporation could exercise this power over and over again, either wantonly or in good faith, to the destruction of private rights and private property.

"The power of the company to determine its location, when once exercised, is exhausted. It may have a discretion as to the selection of its intermediate points, or its route between certain fixed points, but having exercised the discretion, the location cannot be changed without legislative authority. This is in accordance with the ancient rule of the common law, that, 'if a man once determines his selection, it shall be determined forever.' The power to change the location, to a certain extent, is sometimes given by statute. But when so given it is to be strictly

construed. Thus, an authority to vary the route and change the location after a selection, is construed not to be an authority to change the location after the road is constructed." (Pierce on Railroads, 255, 1 Rorer on Railroads, 274).

This view of the general right of a railroad corporation to change a line once established and completed, in whole or in part, is strongly enforced in this case by an act of the Legislature of West Virginia extending the time, theretofore fixed and limited by law, within which to finish the construction of the uncompleted road between Huntington and the mouth of the Big Sandy. The second section of the act of the Legislature of West Virginia amends the charter of the Chesapeake and Ohio Railroad Company as to the time of completion by the following provision:

"The said company shall be allowed for the completion of that part of its railroad from Huntington, in the County of Cabell, to the Big Sandy river, in the County of Wayne, until the first day of January, 1882; and it shall be the *duty* of said company to so complete its said road within that period." (See Laws of 1877, p. 19.)

This legislation plainly declares that the "duty" of the company was to finish the unfinished part of its road as it existed at that time, and not to relocate the line or any part of it, and lay out and construct another road. According to the averments of the bill this "duty," so imposed upon the new company, both by contract and by statute, was deliberately avoided in October, 1879, by the location of an entirely new line.

The only power given by law to change the route of a railroad, at that time, will be found in section 20, par. 5, of chap. 88, of the statute before mentioned; it is as follows:

"To change the grade or location of its railroad, not departing from the present route specified in the articles of incorporation, for the purpose of avoiding annoyances to the public travel, or dangerous or difficult curves or grades, or unsafe or impracticable and unsubstantial grounds or foundations, or for other like reasonable causes." (Sec. 20, par. 5, p. 324.)

There were no excuses for the new line, such as is above enumerated. The bill alleges that the change was made "in palpable violation of law" (2), and there is no pretense set up by the company in its petition for the condemnation proceedings. It will be observed that the conveyance itself expressesa part of the consideration, "the conveniences and benefits resulting from the permanent establishment and maintenance * * * of a depot * * * in the town of Ceredo, at a point near the 'Ceredo House.'"

The abandonment of the established line by the defendant company was a violation of the contract rights of the appellant for which he is entitled to relief in an equity court. (*Warner* vs. *R. R. Co.*, 39 Ohio, St. 70; *Chapman* vs. *Railroad Co.*, 6 Ohio, St. 120; *Balt. and S. R. R.* vs. *Compton*, 2 Gill, 20; 1 Rorer on Railroads, 274.

Third. The proceedings for condemnation were illegal and unauthorized, because the parties interested *had agreed* upon the compensation.

The eighteenth section of the Act of 1872–'3,

granted the only power to condemn lands possessed by this railroad corporation. It provides that "if any corporation shall be *unable to agree* with the owner for the right of way, or for the purchase of any real estate required for the purposes of its corporation, &c., &c., * * * such corporation may acquire such title in the manner as hereinafter provided." (L. of 1872–'3, p. 221.) If the new company and the complainant were bound by the terms of the agreement of 28th July, 1873, as before argued, then, it cannot be said that they "were unable to agree," and the statute could not be called into operation.

Fourth. The Federal Court had jurisdiction to entertain this bill without regard to the citizenship of the parties, because it had taken jurisdiction and was exercising control over the subject matter of controversy, and over the persons engaged in it, and had enjoined complainant from proceeding in any other court for his own protection. The bill was in the nature of a cross-bill.

The existence of the injunction cannot, under the circumstances, affect the standing of the bill, as to the demurrer; it appears that the bill was filed "in open court," and that a motion for process was made at the time and allowed by the court. (1.) This action of the court must be taken as a modification of the injunction then in force, to this extent. The Federal Court had forced the complainant into its jurisdiction and had held him there from about the 17th of May, 1880, to the time of filing the bill, which was on the 3d of May, 1883. It had forbidden him by a stringent injunction to apply to any other

court for relief and protection against the invasions of his estates by this railroad company, and it would be an extraordinary failure of justice and a reproach to the law, if this same court was without jurisdiction under such circumstances to afford him protection against a party to the cause, who was despoiling him of his property.

How far this court can examine into the methods by which the District Court of the United States for West Virginia got and maintained control of these condemnation proceedings, may not be clear, but it is clear to my mind that that court was wholly without legal authority and jurisdiction in the premises. It will be interesting, if not instructive, to look into the record and consider the practice adopted and pursued, and the circumstances attending it. In the first place, the railway company itself initiated the condemnation proceedings under the act of 1872–3, in the County Court of Wayne County, after it had been excluded from the Circuit Court by the decision of the Supreme Court of Appeals, above cited, which was made March 20, 1880. The proceedings had advanced to the filing of a report, by commissioners regularly appointed. This report was filed on or about the 28th of April, 1880, and thereupon the company made haste to pay the amount awarded into court, presumably acting under Section 20 of the 42d Chapter of the Code, thereby reviving the controversy settled, so far as the State Court was concerned, by the highest court of the State in the case before referred to. What action was taken or was threatened by the owners of the lands between the 8th of May and the 17th does not appear, but on the

17th, a petition for the removal of the cause to the United States Court was presented (at five o'clock in the morning) to the County Court of Wayne County, where the proceedings were pending (or more probably to the clerk,) with the bond required by the statute. There was no order of removal made, or if there was it does not appear in the record. On the same day, as it seems, a bill was filed by the railway company in the Federal Court praying an injunction (26) to restrain the appellant and others, defendants in the condemnation proceedings, from interfering with the railway company in its efforts to take possession of their lands which the company had sought to condemn, and the injunction was promptly issued on the same day (26.) The transcript or "copy of the record" was not "entered" in the clerk's office of the District Court until the 18th of May, 1880. (7.) It is only reasonable to conclude that as soon as this injunction was secured the railway company, under the protection of that court from resistance on the part of the owners, went upon the land without any authority whatever and constructed its road and began to run its trains over it.

That the Federal Court was without jurisdiction, for several reasons, seems plain to my mind. In the first place, the act of 1875, known as the "removal act," authorizes removals to the "Circuit Courts" only; this petition prays that the record may be sent to the "District Court," and it was sent there. I do not believe that the provisions of section 571 of the Revised Statutes aid the District Court, although it authorizes it to exercise "Circuit Court" jurisdiction. The act of 1875 was of a later date than the Revised Statutes, and it is emphatic that

the record shall be entered in the "Circuit Court;" it may be that the District Court, under the section of the Revised Statutes, first mentioned, could have heard and determined the case when once removed into the Circuit Court. In the next place, the petition was presented too late; the trial of the cause had begun and had actually proceeded to an award. But the greatest obstacle in the way of the Federal Court in obtaining jurisdictions was the citizenship of the parties. The petition alleged that the appellant, Hoard, was a citizen of New York; this he denied by a sworn answer, and the court instead of trying that issue, as it was bound to do, overruled, or "rejected" the answer, and refused to hear him on the question. As the pleadings in the condemnation case now stand, the plea or answer of Hoard must be taken as true. That the Federal Court was bound to try this issue is well established. (See *Stone* vs. *South Carolina*, 117 U. S., 431; *R. R.* vs. *Dunn*, 123 U. S. and cases cited.) Baldwin was supposed to be a mortgagee (see petition, p. 8), but he appeared in the Federal Court, and disclaimed all interest in the lands (19). This removed him from the case, and left the controversy wholly between citizens of West Virginia. The company was a citizen of West Virginia; the fact that it had also been incorporated by Virginia is immaterial. (See *R. R. Co.* vs. *Alabama*, 107 U. S., 581.)

It is submitted, in behalf of the executors of Mr. Hoard, who has died since this cause was instituted, that as the proceedings stood at the time he filed this bill, the Federal Court was bound to entertain it, and that the demurrer was wrongfully sustained, and that the decree of the court below dismissing

the bill ought to be reversed. It is further submitted that the court below should be advised that it is clearly without jurisdiction of the removal proceedings as the case now appears, and that if the truth of the allegations of Hoard, as to citizenship, in his sworn answer be established, then that court is wholly without jurisdiction in the case, and should send it back.

ENOCH TOTTEN,
For Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1886.

NO. 197.

CHARLES B. HOARD, Appellant,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellee.

Brief of WM. J. ROBERTSON, Counsel for Appellee.

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ENOCH TOTTEN,
For Appellant.

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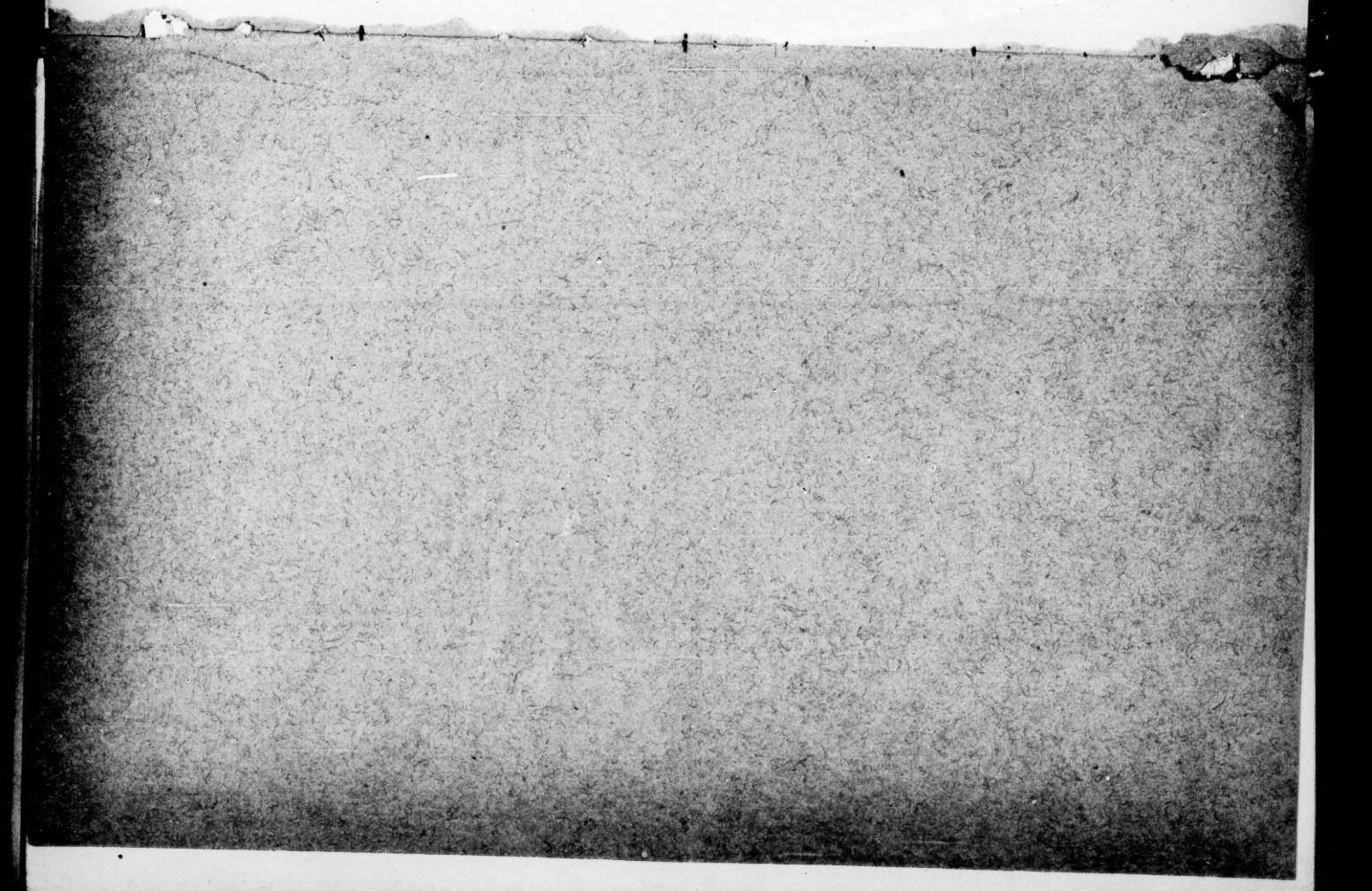


SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1886.

NO. 197.

CHARLES B. HOARD, - - Appellant,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY, - Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the District of West Virginia sustaining the demurrer of the appellee to the appellant's bill of complaint filed against it in that court, and dismissing said bill.

The decree will be found on page 27 of the Record.

The bill and exhibits therewith show that at the time it was filed proceedings were pending and undetermined in said District Court for the condemnation, for the use of the appellee, as a railroad company, of lands belonging to the appellant; and that the appellant had been enjoined by said court from interfering, or causing or permitting others to interfere, by suit or otherwise, to prevent the appellee from entering upon, using and enjoying the land for the condemnation of which said proceedings had been instituted.

It alleged that said condemnation proceedings were without authority of law, and null and void; and that the entry of the appellee upon the lands of the appellant, by virtue of said proceedings, and the construction of its railroad through said lands, was a high handed trespass; and that the daily running of trains over and across said lands was a continu-

ous trespass, assigning as the grounds upon which said allegations rested,

1st. That the act of West Virginia under which said proceedings were had, authorizes proceedings in condemnation only where the parties fail to agree; and that in this case the parties had agreed under seal.

2d. That a railroad company which has established its line cannot change its grade or location, except for adequate cause: and that in the petition which had been filed, asking for the condemnation, no cause was assigned for a change of location.

3d. That there had been no adjudication by any court that the land, sought to be taken, was subject to condemnation; and that, until such adjudication should be had, the appellee had no right or authority to construct a road, or to run trains over complainant's land.

A printed copy of the agreement referred to as a reason why no condemnation proceedings could be had under the law of West Virginia was filed as an exhibit with the bill, and with the certificates of acknowledgement thereto attached, will be found extending from page 4 to page 7 of the Record.

The bill alleged that appellant and the Chesapeake and Ohio Railroad Company entered into it on the 28th day of July, 1873—and that it

> "was sealed with the seal of said company, and signed by its President and Secretary, they thereto being duly authorized, and was also signed and sealed by the said complainant;"

that before the year 1873 the railroad of said company was located by it through the town of Ceredo, and through a large number of town lots in said village, the property of the appellant, and through a large number of the streets and alleys of said village—and that said contract thereafter entered into, regulating the right of way of said railroad through said village, its streets and alleys, and through the lands and lots of the appellant, and agreeing upon the value thereof, and the damage done to the residue of the appellant's property, would have been extremely valuable to the appellant if its provisions and covenants had been fairly and honestly observed and carried out.

The bill further alleged that the money consideration ($1,000) had never been paid, though the contract recites its payment; and that the money consideration was the smallest in value of the covenants and promises contained in the contract—that the construction of the road through Ceredo, and of the depot and station-house, and its maintenance and use, and the construction and maintenance of the sidings as provided for in the contract, would be of inestimable benefit and pecuniary advantage to the appellant, and would enhance in value the town lots and other property owned by him, in and near the town of Ceredo, more than $25,000.

The bill further alleged that the Chesapeake and Ohio Railroad Company, in pursuance of said contract, took posession of the line so located through the village of Ceredo, and through the lots and property of the appellant, and made large and extensive excavations and fills through the same, and partially graded its line through said property.

It further alleged that, subsequently to all of these transactions, a bill was filed in the Circuit Court of Kanawha county, West Virginia, to foreclose certain mortgages theretofore executed by said Chesapeake and Ohio Railroad Company upon all of its property and franchises; that there was a decree of sale, a sale, and confirmation of the sale, and that a deed was executed to certain named parties

"who by virtue of such deed and the law, became a corporation by the name of 'The Chesapeake and Ohio Railway Company,' and entitled to all the works, property, estate, rights, franchises and privileges theretofore owned and possessed by the Chesapeake and Ohio Railroad Company, and subject to all the restrictions imposed by law upon said last named company."

It further alleged that in the month of October, 1879, the said new company (the appellee) although it had full knowledge of the contract made by the appellant with the former company, abandoned its partially completed line through the village of Ceredo; and located a new line through the lands of the appellant—for the condemnation of which new line the proceedings which, as has been already stated, were then pending and undetermined in said District Court, were instituted.

The prayer of the bill was that the said contract should be specifically enforced, and the appellee compelled to permanent-

ly maintain, establish and run its road through the village of Ceredo as specified in the contract; and to erect a depot and place for the convenient and regular receipt and delivery of freight and passengers in the town of Ceredo, near the Ceredo Hotel—that it be decreed to pay to the appellant the sum of $1,000 with interest from the date of the contract, and to do all and everything covenanted by said contract to be done and performed—and that it should be inhibited, restrained and enjoined from all further proceedings in the then pending condemnation case—and on final hearing of the case, that it should be perpetually enjoined from running its engines, cars and trains over the appellant's land on its road as then located and constructed.

The whole of the record in the condemnation proceeding was filed as an exhibit with the bill, and will be found from page 7 to page 26 of the Record.

It will be seen that the bill is little more than a reproduction of the answer filed by the appellant to the petition of the appellee in that proceeding—which answer will be found on pages 23 and 24 of the Record—the only matter contained in the bill which is not set forth, in almost identical language, in the answer, being the prayer for the specific enforcement of the contract—and the assertion, page 3 of the Record, that until an adjudication has been made for the condemnation of land for the use of a railroad company, the company has no right to construct its road, or to run its trains over the land —an assertion which can have no effect but to create surprise that it should have been made, in view of the 20th section of Chapter 42 of the Code of West Virginia, which is as follows, viz:

"After such report has once been made, though it be set aside, recommitted, or new commissioners appointed, the applicant, upon paying into court the sum ascertained by such report, with legal interest thereon from the date of the report until payment, may, notwithstanding the pendency of further proceedings, enter upon, take and use, for the purpose specified in the application, that part of the land in respect to which such payment is made. And no order shall be made, or any injunction awarded, by a court or judge, to stay him in so doing, unless it be manifest that the applicant is insolvent; or that he, his officers, agents, or servants are transcending their authority; or that such interposition is necessary to prevent injury which cannot be adequately compensated in damages."

And in view of the fact, proof of which is furnished by one of the exhibits filed with the bill, page 15 of the Record,

that the appellee had paid into court the sum ascertained by the commissioners as a just compensation for the land proposed to be taken, with interest thereon from the date of the report.

POINTS OF ARGUMENT.

Upon the case of the appellant thus presented, it is manifest that his bill was properly dismissed.

I. It was proper to dismiss it because it was filed in violation of the order of injunction, granted by the same court in which the bill was presented, and to be found on page 26 of the Record.

Before the appellant could institute suit for the purpose of obtaining any of the relief sought by the bill, it was necessary for him to obtain a dissolution or modification of this order of injunction—which could be done only by appropriate proceedings in the suit in which the injunction had been granted. No such proceedings appear to have been had; and the order of injunction was in full force when the bill was filed.

Indeed the only ground upon which the appellant could hope that the court would take jurisdiction of the case was that the injunction restrained him from suing elsewhere—for there is not only no allegation as to citizenship to confer jurisdiction of the case upon a court of the United States—but it appears from the Record (pages 20 and 21) that the appellant had made affidavit that, for jurisdictional purposes, he and the appellee were to be regarded as citizens of the same State. So that but for this order of injunction there would be no ground whatsoever upon which the jurisdiction of the court in which the bill was filed could be sustained.

II. Even if the foregoing objection to the maintenance of the suit could be removed, the bill was properly dismissed, because no case is made by it proper for the interposition of a court of equity.

The object of the bill is two-fold: First, to prevent the condemnation of the land sought to be condemned for the use of the appellee. Second, to enforce the alleged contract set up by the bill.

The first of these objects is attainable, if at all, by litigating the matter in the proceedings pending in the same court for the condemnation of the land, and in that way only.

As to the second of them, it is plain that if the appellant has any claim against the appellee, under the alleged contract, it should be asserted by an action at law—it being of a character to be fully compensated by damages recoverable in such action.

III. Another ground on which the demurrer was properly sustained, is that the bill does not allege that the contract—which is an instrument under seal—was ever completed *by delivery*.

That it could not have been so alleged, is inferable not only from the fact that the appellant declined to amend his bill (see page 27 of the Record) but from the contract itself therewith exhibited. It will be observed that it was signed and acknowledged by the president and secretary of the railroad company and the seal of the company attached, on the 1st day of September, 1873. It does not appear when it was signed by the appellant, nor when the name of the attesting witness to his signature was affixed to the instrument—but it does appear that it was not acknowledged by the appellant until the 21st day of July, 1879, that being the date of the certificate of the Notary, before whom it was acknowledged by him.

It thus appears that the original was in the possession of the appellant on the 21st day of July, 1879, but the bill does not state in whose possession it had been previously, or what became of it afterwards; nor is any explanation given why, instead of filing the *original* with the answer to the petition in the condemnation proceedings, or with the bill, a "*printed copy*" of it is filed with each of those papers; nor why the appellant delayed his acknowledgment before a Notary not only until after the other party to the contract—the Chesapeake and Ohio Railroad Company—had ceased to exist; but after the appellee had caused its line, over the portion of his land which it was seeking to condemn, to be located and surveyed—that having been done in May, 1879, as appears on page 8 of the Record.

IV. Another ground on which the demurrer was properly sustained and the bill dismissed, is, that it clearly appeared that whatever may have been the rights of the appellant against the Chesapeake and Ohio Railroad Company under the alleged contract, he had no rights whatsoever under it as against the appellee—the bill stating that, after the contract is alleged to have been made, and after the acts which it is alleged were done under and pursuant to it, the Chesapeake and Ohio Railway Company (the appellee) became a corporation by virtue of a sale and conveyance under decrees rendered in a suit brought for the foreclosure of mortgages executed by the Chesapeake and Ohio Railroad Company, and not alleging that the corporation thus created has done any act which can be construed as an adoption or ratification of the contract alleged to have been made by its predecessor, the Chesapeake and Ohio Railroad Company.

That a corporation created as the bill admits the appellee to have been, is not a continuation of the old corporation to whose rights and franchises it succeeds, but becomes an entirely new corporation, deriving its existence, and having its rights conferred, and duties prescribed, by the acts of West Virginia under which such sales are made, is settled by the decision of this court in the case of *The Chesapeake and Ohio Railway Company* v. *Miller, Auditor*, 114 U. S. 176.

There can therefore be no pretence that the appellee is bound by the contract alleged to have been made by the appellant with the Chesapeake and Ohio Railroad Company.

It is respectfully submitted that, upon any one of the foregoing grounds, it was proper to sustain the demurrer, and dismiss the bill; and that the decree of the court below should be affirmed.

WM. J. ROBERTSON,
Counsel for the Chesapeake
and Ohio Railway Company.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 17.

CHARLES B. HOARD, APPELLANT,

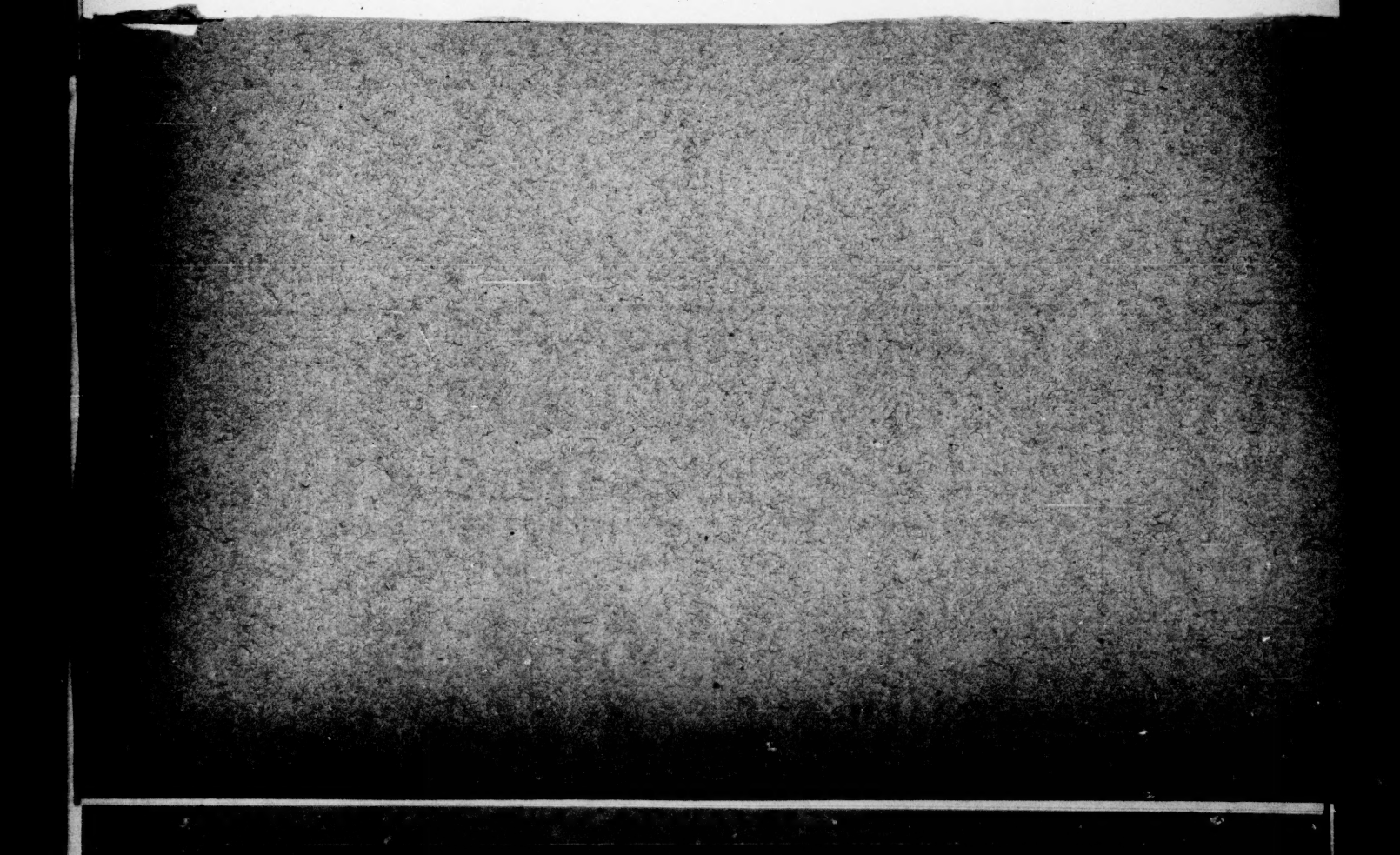
vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLEE.

BRIEF FOR APPELLEE IN REPLY.

WM. J. ROBERTSON,
Counsel for Appellee.

JUDD & DETWEILER, PRINTERS.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 17.

CHARLES B. HOARD, APPELLANT,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLEE.

BRIEF FOR APPELLEE IN REPLY.

The fact that the brief for the appellant was not filed until after that for the appellee renders an additional brief for the latter proper by way of reply.

I.

It is deemed unnecessary to reply to so much of the brief for the appellant as attempts to show that the condemnation proceedings were improperly removed from the State to the Federal court, further than to say that the question does not arise and cannot be considered in this suit.

Two of the parties to those proceedings obtained from this Court, in October, 1881, a rule directing the judge of the district court, to which they had been removed, to show cause why a *mandamus* should not issue commanding him to strike the cause, so far as they were concerned, from the docket of his court, and remand the same to the State court whence it came. The judge appeared and answered the rule, and this Court held that the propriety of the action of the district court in overruling the motion to remand the cause was reviewable only after final judgment and when the amount involved was sufficient to give jurisdiction to the Supreme Court: and accordingly, without determining whether the case was or was not properly removed, denied the writ.

See the case, *Ex parte* Hoard, 105 U. S., 578.

II.

The case of The Chesapeake and Ohio Railway Company *vs.* Hoard, 16 W. Va., 270, relied on in appellant's brief, decides merely that chapter 88, of the acts of 1872–'73, had not been repealed by chapter 114 of the acts of 1875 and the amendatory act of 1879; and that proceedings by railroad companies to condemn land for their use must therefore be had in the county court, and not in the circuit court, as provided for in reference to corporations generally by the latter acts.

There is no ground whatsoever for the assumption that section 20 of chapter 42 of the Code of West Virginia was repealed by chapter 88 of the acts of 1872–'73; on the contrary, the 42d section of that chapter (page 237) expressly provides that—

"All general laws of this State in relation to railroad corporations and the powers and duties thereof, so far as the same are not inconsistent with the provisions of this act, shall remain in force and be applicable to railroad corporations organized under this act."

Section 20 of chapter 42 of the Code (a copy of which will be found on page 4 of the brief heretofore filed for the appellee) was a general law of the State in relation to railroad as well as other corporations, and it is not in the slightest degree inconsistent with any provision of chapter 88 of the acts of 1872–'73; and cannot possibly be held to have been repealed by that chapter.

III.

As to the suggestion that "the proceedings for condemnation were illegal and unauthorized because the parties interested *had agreed* upon the compensation," it would, even if the appellee could be held to be bound by the pretended agreement, be sufficient to say that that agreement had no reference whatsoever to the land which the appellee instituted proceedings to condemn for its use, but related exclusively to other land which it does not desire to occupy. If, however, this were otherwise, the question is one which can be raised in the condemnation proceedings only.

The same may be said of the objection that the petition in the condemnation proceedings did not show on its face that a change of location was desired for any of the purposes named in paragraph 5 of section 20 of chapter 88 of the acts of 1872–'73.

And it may be further said that, if made in them, it

would be unavailing; for, even if the provision could be regarded as restrictive, there would be no necessity for the petition to set forth the reasons for a change of route; it would be sufficient, when objection is made to the proposed change, to show that they exist.

1. Rorer on Railroads, 274, *et seq.*, to which reference is made in appellant's brief, so far from sustaining the position there taken, shows that, unless restricted by the provisions of its charter, a railroad company may change the location of its road, within the limits of its general route, when and as it may think fit; and if, in so doing, it violates any contract it may have made with an individual, the only remedy against it is by an action for damages.

Paragraph 5 of section 20 of chapter 88, of the acts of 1872–'73, is merely a legislative recognition of this right of a railroad company to make changes in the location of its road—a right which exists independently of such recognition.

It may, in passing, be observed that this paragraph is (owing, no doubt, to a typographical error) inaccurately copied on page 13 of appellant's brief—the word "*present*" being substituted for the word "*general*," before the word "*route*," in the second line.

IV.

It can hardly be necessary to argue to show that the obligation of a railroad company to comply with a contract entered into by it with an individual is not one of the "*duties*" which, under the act of February 18th, 1871 (Laws of 1871,

page 91), the corporation, created by a sale and conveyance of its works and property, is bound to perform—especially in view of the provision in the act itself, that—

"Such corporation, so created, shall not be entitled to debts due to the said first company; and shall not be liable for any debts of, *or claims against*, the said first company which may not be expressly assumed in the contract of purchase."

Here it is not alleged that the appellee has, at any time, or in any way, done anything which can be construed into a promise to perform the agreement alleged to have been made with its predecessor company.

The act of 1877, page 19, making it the *duty* of that company to complete its road from Huntington to the Big Sandy River, within a specified time, has been fully complied with, notwithstanding the obstruction thrown in the way of the appellee by the efforts of the appellant to prevent the acquisition of the land needed for the purpose.

WM. J. ROBERTSON,
Counsel for Appellee.